The Constitution's framers would have trouble recognizing today's presidency. To be sure, they believed that the Articles of Confederation were flawed because they did not provide for an executive, but many delegates had serious reservations about awarding too much authority to the executive branch after what they had suffered under the British monarchy. In fact, those who supported the New Jersey Plan envisioned a plural executive in which two individuals would share the chief executive position as insurance against excessive power accruing to a single person. With little doubt the framers would be amazed at the far-reaching domestic and foreign powers wielded by modern presidents, to say nothing of the hundreds of departments, agencies, and bureaus that constitute the executive branch.

Some of this growth likely traces to the rather loose wording of Article II. The article has neither the detail nor the precision of the framers' Article I description of the legislature; instead, it is dominated by issues of selection and removal and devotes less attention to powers and limitations. The wording is quite broad. Presidents are given the undefined “executive power” of the United States and are admonished to take care that the laws are “faithfully executed.” Other grants of authority, such as the president's role as “Commander in Chief of the Army and Navy” and the preferential position given the chief executive in matters of foreign policy, allow for significant expansion.

The presidency also has grown in response to a changing world. As American society became more complex, the number of areas requiring government action mushroomed. Overwhelmed by these responsibilities, among other reasons, Congress delegated to the executive branch authority that the framers probably did not anticipate. In addition, the expanding importance of defense and foreign policy demanded a more powerful presidency.

As these changes took place, the Supreme Court was frequently called on to resolve disputes over the constitutional limits of executive authority. This chapter explores how the justices have interpreted Article II of the Constitution. It is divided into five sections. The first and second provide overviews of the structure of the presidency and the tools of presidential power, respectively. The third takes up the Supreme Court's general response to questions concerning presidential power, the fourth considers the domestic powers of the president, and the fifth explores the role of the president in external relations.

The Structure of the Presidency

When the framers met in Philadelphia in 1787, they were uncertain about how to create an executive for the new nation. They knew all too well the dangers of a strong executive. Indeed, widespread dissatisfaction with the British system led states, during the period from 1776 to 1778, to adopt constitutions that established weak governorships. State executives were given short terms of office, with few powers, and those few often shared with a council. By 1787, however, some states had become sufficiently dissatisfied with their weak governorships that they strengthened them.

1We adopt some of this discussion from Farber and Sherry, A History of the American Constitution, 107–110. Farber and Sherry contains excerpts of the debates over Article II.
During the war with Britain, it had become apparent that state executives were too inexperienced and politically constrained to maintain an effective effort. Therefore, by the time the framers met, a range of executive systems existed in the states—from those that remained weak to those that were quite strong.

Which position would the founders take? Answers come in Article II of the Constitution, which outlines the structure and powers of the presidency. We begin here with the structure of the institution, focusing on four topics: the president’s selection, removal, tenure, and succession.

Selection of the President

The convention delegates considered several mechanisms for choosing the president, including, notably, selection by the national legislature. In the end they devised a novel solution: the Electoral College. Until then, the executives of most nations were chosen by bloodline, military power, or legislative selection (see Box 4-1). No other country had experimented with a system like the Electoral College apparatus created in Philadelphia. Perhaps because it had never been tried, the system, as we shall see, was plagued with defects that required correction over time.

The framers designed the Electoral College system to allow the general electorate to have some influence on the selection of the chief executive without resorting to direct popular election. Then, as now, the plan called for each state to select presidential electors equal in number to the state’s delegates to the Senate and the House of Representatives. The Constitution empowered the state legislatures to decide the method of choosing the electors. Popular election was always the most common method, but in the past some state legislatures voted for the electors. The Electoral College system was based on the theory that the states would select as electors their most qualified citizens, who would exercise their best judgment in the selection of the president. And perhaps for that reason Article II specifies no qualifications for electors (other than disqualifying those who hold federal office).

As for the president, the Constitution mentions only three qualifications. First, Article II requires that

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**BOX 4-1**

**The American Presidency in Global Perspective**

THE METHOD for selecting the president generated a good deal of discussion at the 1787 Constitutional Convention. The delegates considered and rejected several mechanisms, including selection by the national legislature. In the end the framers devised a novel solution: states of electors equal to the congressional delegation of each state would elect the president.

In many countries—especially in Western Europe but also in Israel and Japan—chief executives are not chosen in elections separate from those of the legislative branch. In these parliamentary systems, executives may be the leaders of parties that win legislative elections or are chosen by an elected legislature, as in Germany and the United Kingdom. Sometimes leaders continue to hold seats in the parliament. This practice is forbidden by the U.S. Constitution, which states, “[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”

Under the parliamentary system, if the electorate votes the ruling party in the legislature out of office, the executive also changes. Moreover, the executive is typically accountable to such a legislature: the membership may remove a leader after a vote of no confidence. Because of the importance of no-confidence votes, many nations have developed elaborate procedures for considering motions of no confidence. For example, the Italian parliament may not debate a no-confidence motion for more than three days, and the motion must be signed by at least one-tenth of the members of one house. In Germany a majority in the legislature may remove the chancellor, but only by simultaneously electing a successor.

only individuals who are natural-born citizens may become president.\(^2\) Naturalized citizens—those who attain citizenship after birth—are not eligible. Second, to be president a person must have reached the age of thirty-five. Third, the president must have been a resident of the United States for fourteen years. The Constitution made no mention of qualifications for vice president, but this oversight was corrected with the 1804 ratification of the Twelfth Amendment, which says that no person can serve as vice president who is not eligible to be president.

Under the original procedures detailed in Article II, the electors were to assemble in their respective state capitals on Election Day and cast votes for their presidential preferences. Each elector had two votes, only one of which could be cast for the candidate from the elector’s home state. These ballots were then sent to the federal capital, where the president of the Senate opened them. The candidate receiving the most votes would be declared president if the number of votes received was a majority of the number of electors.

Article II anticipated two possible problems with this procedure: First, because the electors each cast two votes, it was possible for the balloting to result in a tie between two candidates. In this event, the Constitution stipulated that the House of Representatives should select one of the two. Second, if multiple candidates sought the presidency, it would be possible that no candidate would receive the required majority. In this case the House was to decide among the top five finishers in the Electoral College voting. In settling such disputed elections, each state delegation was to cast a single vote, rather than allowing the individual members to vote independently.

In the original scheme the vice president was selected right after the president. The formula for choosing the vice president was simple—the vice president was the presidential candidate who received the second-highest number of electoral votes. If two or more candidates tied for second in the Electoral College voting, the Senate would select the vice president from among them.

The first two elections took place with no difficulty. In 1789 George Washington received one ballot from each of the 69 electors who participated and was elected president. John Adams became vice president because he received the next-highest number of electoral votes (thirty-four). History repeated itself in the election of 1792, with Washington receiving one vote from each of the 132 electors. Adams again gathered the next-highest number of votes (seventy-seven) and returned to the vice presidency.

The defects in the electoral system first became apparent with the election of 1796. By this time political parties had begun to develop, and this election was a contest between the (incumbent) Federalists and the Democratic-Republicans. With Washington declining to run for a third term, John Adams became the Federalist candidate, and Thomas Jefferson was the choice of those who wanted political change. Adams won the presidency with seventy-one electoral votes, and Jefferson, with sixty-eight, became vice president. The nation therefore had a divided executive branch, with a president and a vice president from different political parties.

Matters grew even worse with the 1800 election. The Democratic-Republicans were now the more popular of the two major parties, and they backed Jefferson for president and Aaron Burr for vice president. Electors committed to the Democratic-Republican candidates each cast one ballot for Jefferson and one for Burr. Although it was clear who was running for which office, the method of selection did not allow for such distinctions. The result was that Jefferson and Burr each received seventy-three votes, and the election moved to the outgoing Federalist-dominated House of Representatives for settlement. Each of the sixteen states had a single vote, and a majority was required for election. On February 11, 1801, the first vote in the House was taken. Jefferson received eight votes and Burr six. Maryland and Vermont were unable to register a preference because their state delegations were evenly divided. The voting continued until the thirty-sixth ballot on February 17, when Jefferson received the support of ten state delegations and was named president, with Burr becoming vice president.

It was clear that the Constitution needed to be changed to avoid such situations. Congress proposed the Twelfth Amendment in 1803, and the states ratified it the next year. The amendment altered the selection system by separating the voting for president and vice president. Rather than casting two votes for president, electors would vote for a presidential candidate and...
then vote separately for a vice-presidential candidate. The House and Senate continued to settle presidential and vice-presidential elections in which no candidate received a majority, although the procedures for such elections also were modified by the amendment.

Although the evolution of political parties and the reduction in the degree of independence exercised by presidential electors have changed in the way the system operates, presidential and vice-presidential elections are still governed by the Twelfth Amendment—and the Electoral College persists. Despite calls by some to replace it with direct popular election, proponents of this reform have never achieved enough strength to prompt Congress or the state legislatures to propose the necessary constitutional amendment. Historically, opposition to popular election has come from the smaller states, which enjoy more influence within the Electoral College system than they would under popular election reforms.

Indeed, until the 2000 election, most Americans were not all that concerned with reforming the presidential selection system. Before 2000, only three elections produced a result at odds with the popular vote. But in that year, Vice President Al Gore narrowly won the popular vote, though his opponent Texas governor George W. Bush assumed the presidency after capturing a majority of the Electoral College votes. The election was so close that the result was not known until weeks after the ballots were counted, when the Supreme Court’s decision in Bush v. Gore (2000) settled the final issues that determined the outcome. The public curiosity surrounding this disputed election served as a national civics lesson in how the U.S. president is selected and sparked a widespread public debate on election reform. Consider the issue of reform as you read the excerpt below. Also consider another hotly debated question surrounding this disputed election: To what degree did the justices allow their partisan preferences to enter into the decision? This question has arisen, in part, because five of the seven Republican justices cast their “ballots” for the candidate of their party, while both Democratic justices (Breyer and Ginsburg) “voted” for Gore.

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**Bush v. Gore**

531 U.S. 98 (2000)


Oral arguments are available at https://www.oyez.org/cases/2000/00-949.

Vote: 5 (Kennedy, O’Connor, Rehnquist, Scalia, Thomas)

4 (Breyer, Ginsburg, Souter, Stevens)

OPINION OF THE COURT: Per Curiam

CONCURRING OPINION: Rehnquist

DISSenting OPINIONS: Breyer, Ginsburg, Souter, Stevens

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FACTS:

The presidential election of November 7, 2000, was one of the closest races in American history. On election night it became clear that the battle between Governor Bush and Vice President Gore for the 270 electoral votes necessary for victory would be decided by the outcome in the state of Florida.

Initial vote counts in Florida gave Bush a lead of 1,780 votes out of 6 million cast. This narrow margin triggered an automatic machine recount held on November 10. The results gave Bush a victory, but the margin had slipped to a scant 250 votes, with absentee overseas ballots still to be counted. By this time charges and countercharges of voting irregularities led to lawsuits and political protests. As the various issues sorted themselves out over the ensuing days, the outcome of the election appeared to hinge on the large numbers of undervoted ballots in a select number of traditionally Democratic counties. Undervoted ballots were those for which vote-counting machines did not register a presidential preference. In many cases such undercounting was the result of a failure by the voter to pierce completely the computer punch-card ballot. In other cases, machine malfunction may have been the cause. Gore supporters demanded a hand recount of the undervoted ballots.

Three statutory deadlines imposed obstacles for the labor-intensive and time-consuming manual recounts. First, Florida law directed the secretary of state to certify the election results by November 18. Second, federal law (3 U.S.C. §5) provided that if all controversies and contests over a state’s electors were resolved by December 12, the state’s slate would be considered conclusive and

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John Quincy Adams in 1824, Rutherford Hayes in 1876, and Benjamin Harrison in 1888. There is some debate over whether John F. Kennedy (in 1960) should be added to this list. See Brian J. Gaines, “Popular Myths about Popular Vote—Electoral College Splits,” PS: Political Science and Politics 34 (2001): 70–75.
beyond challenge (the so-called safe harbor provision). And third, federal law set December 18 as the date the electors would cast their ballots.

As the manual recounts proceeded, it became clear that the process would not be completed prior to the November 18 deadline for certification. Florida’s Republican secretary of state, Katherine Harris, announced her intention to certify the vote on November 18 regardless of the ongoing recounts. Gore forces went to court to block her from doing so. A unanimous Florida Supreme Court, emphasizing that every vote cast should be counted, ruled that the recounts should continue and extended the certification date to November 26. Believing the Florida court had exceeded its authority, Bush’s lawyers appealed this decision to the U.S. Supreme Court. On December 4 the justices set aside the Florida court’s certification extension and asked the court to explain the reasoning behind its decision (Bush v. Palm Beach County Canvassing Board, 2000).

In the meantime, Secretary Harris on November 26 certified Bush as winning the state by 537 votes. Four days after the U.S. Supreme Court’s decision, the Florida high court, in response to an appeal by Gore, ordered a new statewide manual recount of all unverified ballots to begin immediately. The recounts were to be conducted by local officials guided only by the instruction to determine voter intent on each ballot. Bush appealed this decision to the U.S. Supreme Court. On December 9 the justices scheduled the case for oral argument and ordered the recounts to stop pending a final decision. Both sides were well represented. Bush’s attorney, Theodore Olson, had served as an assistant attorney general in the Reagan administration and, in private practice, had argued many cases before the Supreme Court. Gore’s attorney was David Boies, a prominent litigator whose previous clients included George Steinbrenner and CBS. He had also helped the Justice Department win a major antitrust case against Microsoft. (See Box 4-2.)

Two major issues dominated the case. First, did the Florida Supreme Court violate federal law by altering the election procedures in place prior to the election? Second, did the Florida Supreme Court violate the equal protection clause of the Fourteenth Amendment when it ordered a recount to take place without setting a single uniform standard for determining voter intent?

A badly divided Supreme Court issued its ruling on December 12. The per curiam opinion focuses on the equal protection claim. The concurring and dissenting
opinions include a wide range of views on the issues presented and debate what remedies should be imposed for any constitutional or statutory violations found.

**ARGUMENTS:**

For the petitioners, George W. Bush et al.:

- The Florida Supreme Court violated 3 U.S.C. §5, which states that appointments of electors are conclusive only if made pursuant to laws enacted prior to election day. By demanding that the recounts continue, the Florida Supreme Court is changing state law instead of interpreting it.
- The new standards, procedures, and timetables established by the Florida Supreme Court for the selection of Florida’s presidential electors are in conflict with the state legislature’s plan for the resolution of election disputes. The court’s new framework violates Article II, which vests in state legislatures the exclusive authority to regulate the appointment of presidential electors.
- The manual recount procedures newly concocted by the Florida Supreme Court are arbitrary, standardless, and subjective, and will necessarily vary in application, both across different counties and within individual counties, in violation of the equal protection clause of the Fourteenth Amendment. The equal protection clause forbids the state from treating similarly situated voters differently based merely on where they live.

For the respondents, Albert Gore Jr. et al.:

- The federal law that petitioners accuse the Florida Supreme Court of violating supplies an option of safe harbor only if states choose to use it.
- In its ruling, the Florida court did not “make law” or establish any new legal standards that conflict with legislative enactments. Rather, the court engaged in a routine exercise of statutory interpretation that construed the Florida election code according to the legislature’s designated manner for choosing electors in a statewide election.
- The Florida Supreme Court’s judgment is fully consistent with equal protection. Petitioners’ allegations about the way the manual recounts have been conducted have no support in the record and are based on unsubstantiated rumors, untested “evidence,” and biased ex parte submissions. In fact, the recounts have been conducted in full public view by counting teams made up of representatives from different political parties, with the supervision of a canvassing board that includes a sitting county judge and review by the Florida judiciary. Supreme Court precedents emphasize the fundamental right of all qualified voters to cast their votes and to have their votes counted.

**PER CURIAM.**

The closeness of this election, and the multitude of legal challenges which have followed in its wake, have brought into sharp focus a common, if heretofore unnoticed, phenomenon. Nationwide statistics reveal that an estimated 2% of ballots cast do not register a vote for President for whatever reason, including deliberately choosing no candidate at all or some voter error, such as voting for two candidates or insufficiently marking a ballot. In certifying election results, the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements.

This case has shown that punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter. After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, §1. . . . (T)he State legislature’s power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution. History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the State legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. . . .

Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another. . . .
There is no difference between the two sides of the present controversy on these basic propositions. Respondents say that the very purpose of vindicating the right to vote justifies the recount procedures now at issue. The question before us, however, is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.

Much of the controversy seems to revolve around ballot cards designed to be perforated by a stylus but which, either through error or deliberate omission, have not been perforated with sufficient precision for a machine to count them. In some cases a piece of the card—a chad—is hanging, say by two corners. In other cases there is no separation at all, just an indentation.

The Florida Supreme Court has ordered that the intent of the voter be discerned from such ballots. For purposes of resolving the equal protection challenge, it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition. The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right. Florida's basic command for the count of legally cast votes is to consider the "intent of the voter." This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.

The law does not refrain from searching for the intent of the actor in a multitude of circumstances; and in some cases the general command to ascertain intent is not susceptible to much further refinement. In this instance, however, the question is... how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper which, it is said, might not have registered as a vote during the machine count. The factfinder confronts a thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment.

The want of those rules here has led to unequal evaluation of ballots in various respects. As seems to have been acknowledged at oral argument, the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.

The record provides some examples. A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a per se rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment...

The State Supreme Court ratified this uneven treatment. It mandated that the recount totals from two counties, Miami-Dade and Palm Beach, be included in the certified total. The court also appeared to hold sub silentio that the recount totals from Broward County, which were not completed until after the original November 14 certification by the Secretary of State, were to be considered part of the new certified vote totals even though the county certification was not contested by Vice President Gore. Yet each of the counties used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties...

The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied...
Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. In addition, the Secretary of State has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment be used to screen out undervotes, a function for which the machines were not designed. If a recount of overvotes were also required, perhaps even a second screening would be necessary.

The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 U.S.C. §5. That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. §5, JUSTICE BREYER'S proposed remedy—ordering the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18—contemplates action in violation of the Florida election code, and hence could not be part of an "appropriate" order authorized by [Florida law]. None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

The judgment of the Supreme Court of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring.

We join the per curiam opinion. We write separately because we believe there are additional grounds that require us to reverse the Florida Supreme Court's decision.

We deal here not with an ordinary election, but with an election for the President of the United States. . . .

In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. . . . But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. Article II, §1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," electors for President and Vice President. Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance. . . .

Art. II, §1, cl. 2, "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method of appointment. A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question. . . .

In Florida, the legislature has chosen to hold statewide elections to appoint the State's 25 electors. Importantly, the legislature has delegated the authority to run the elections and to oversee election disputes to the Secretary of State (Secretary) and to state circuit courts. . . . In any election but a Presidential election, the Florida Supreme Court can give as little or as much deference to Florida's executives as it chooses. . . . But, with respect to a Presidential election, the court must be both mindful of the legislature's role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate.

In order to determine whether a state court has infringed upon the legislature's authority, we necessarily must examine the law of the State as it existed prior to the action of the court. Though we generally defer to state courts on the interpretation of state law there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law. . . .
This inquiry does not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislatures. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

The Constitution assigns to the States the primary responsibility for determining the manner of selecting the Presidential electors. When questions arise about the meaning of state laws, including election laws, it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers. On rare occasions, however, either federal statutes or the Federal Constitution may require federal judicial intervention in state elections. This is not such an occasion.

The federal questions that ultimately emerged in this case are not substantial. Article II provides that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.” It does not create state legislatures out of whole cloth, but rather takes them as they come—as creatures born of and constrained by, their state constitutions. . . . The legislative power in Florida is subject to judicial review pursuant to Article V of the Florida Constitution, and nothing in Article II of the Federal Constitution frees the state legislature from the constraints in the state constitution that created it. Moreover, the Florida Legislature’s own decision to employ a unitary code for all elections indicates that it intended the Florida Supreme Court to play the same role in Presidential elections that it has historically played in resolving electoral disputes. The Florida Supreme Court’s exercise of appellate jurisdiction therefore was wholly consistent with, and indeed contemplated by, the grant of authority in Article II. . . .

Admittedly, the use of differing standards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process. . . .

What must underlie petitioners’ entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today’s decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judges as an impartial guardian of the rule of law.

I respectfully dissent.

JUSTICE SOUTER, with whom JUSTICE BREYER joins . . . dissenting.*

Petitioners have raised an equal protection claim, in the charge that unjustifiably disparate standards are applied in different electoral jurisdictions to otherwise identical facts. It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters’ intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on. But evidence in the record here suggests that a different order of disparity obtains under rules for determining a voter’s intent that have been applied (and could continue to be applied) to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics (such as “hanging” or “dimpled” chads). I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters’ fundamental rights. The differences appear wholly arbitrary.

*Editors’ note: Justice Souter’s dissent considered three issues: “whether the State Supreme Court’s interpretation of the statute providing for a contest of the state election results somehow violates 3 U.S.C. §5; whether that court’s construction of the state statutory provisions governing contests impermissibly changes a state law from what the State’s legislature has provided, in violation of Article II, §1, cl. 2, of the national Constitution; and whether the manner of interpreting markings on disputed ballots failing to cause machines to register votes for President (the undervote ballots) violates the equal protection or due process guaranteed by the Fourteenth Amendment.” Justices Stevens and Ginsburg joined his dissent with regard to the first two issues but not on the third, which is the one we excerpt.
In deciding what to do about this, we should take account of the fact that electoral votes are due to be cast in six days. I would therefore remand the case to the courts of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments, to be applied within and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order.

Unlike the majority, I see no warrant for this Court to assume that Florida could not possibly comply with this requirement before the date set for the meeting of electors, December 18. To recount these [disputed votes] manually would be a tall order, but before this Court stayed the effort to do that the courts of Florida were ready to do their best to get that job done. There is no justification for denying the State the opportunity to try to count all disputed ballots now.

I respectfully dissent.

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins, and with whom JUSTICE SOUTER and JUSTICE BREYER join, dissenting.

The extraordinary setting of this case has obscured the ordinary principle that dictates its proper resolution: Federal courts defer to state high courts’ interpretations of their state’s own law. This principle reflects the core of federalism, on which all agree. “The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.” The Chief Justice’s solicitude for the Florida Legislature comes at the expense of the more fundamental solicitude we owe to the legislature’s sovereign. Were the other members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court.

JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join except as [to paragraphs 3–4 below], and with whom JUSTICE SOUTER joins [except as to the final paragraph of this excerpt], dissenting.

The Court was wrong to take this case. It was wrong to grant a stay. It should now vacate that stay and permit the Florida Supreme Court to decide whether the recount should resume.

The political implications of this case for the country are momentous. But the federal legal questions presented, with one exception, are insubstantial.

The majority raises three Equal Protection problems with the Florida Supreme Court’s recount order: first, the failure to include overvotes in the manual recount; second, the fact that all ballots, rather than simply the undervotes, were recounted in some, but not all, counties; and third, the absence of a uniform, specific standard to guide the recounts. As far as the first issue is concerned, petitioners presented no evidence, to this Court or to any Florida court, that a manual recount of overvotes would identify additional legal votes. The same is true of the second, and, in addition, the majority’s reasoning would seem to invalidate any state provision for a manual recount of individual counties in a statewide election.

The majority’s third concern does implicate principles of fundamental fairness. The majority concludes that the Equal Protection Clause requires that a manual recount be governed not only by the uniform general standard of the “clear intent of the voter,” but also by uniform subsidiary standards (for example, a uniform determination whether indented, but not perforated, “undervotes” should count). The Florida Supreme Court ordered the inclusion of [one county’s] underranked “legal votes” even though those votes included ballots that were not perforated but simply “dimpled,” while newly recounted ballots from other counties will likely include only votes determined to be “legal” on the basis of a stricter standard. In light of our previous remand, the Florida Supreme Court may have been reluctant to adopt a more specific standard than that provided for by the legislature for fear of exceeding its authority under Article II. However, since the use of different standards could favor one or the other of the candidates, since time was, and is, too short to permit the lower courts to iron out significant differences through ordinary judicial review, and since the relevant distinction was embodied in the order of the State’s highest court, I agree that, in these very special circumstances, basic principles of fairness may well have counseled the adoption of a uniform standard to address the problem. In light of the majority’s disposition, I need not decide whether, or the extent to which, as a remedial matter, the Constitution would place limits upon the content of the uniform standard.

Nonetheless, there is no justification for the majority’s remedy, which is simply to reverse the lower court
and halt the recount entirely. An appropriate remedy would be, instead, to remand this case with instructions that, even at this late date, would permit the Florida Supreme Court to require recounting all undercounted votes in Florida, including those from Broward, Volusia, Palm Beach, and Miami-Dade Counties, whether or not previously recounted prior to the end of the protest period, and to do so in accordance with a single-uniform substandard.

The majority justifies stopping the recount entirely on the ground that there is no more time. . . . But the majority reaches this conclusion in the absence of any record evidence that the recount could not have been completed in the time allowed by the Florida Supreme Court. . . . Of course, it is too late for any such recount to take place by December 12, the date by which election disputes must be decided if a State is to take advantage of the safe harbor provisions of 3 U.S.C. §5. Whether there is time to conduct a recount prior to December 18, when the electors are scheduled to meet, is a matter for the state courts to determine. And whether, under Florida law, Florida could or could not take further action is obviously a matter for Florida courts, not this Court, to decide. . . .

I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary “check upon our own exercise of power,” “our own sense of self-restraint.” United States v. Butler (1936) (Stone, J., dissenting). Justice Brandeis once said of the Court, “The most important thing we do is not doing.” What it does today, the Court should have left undone. I would repair the damage done as best we now can, by permitting the Florida recount to continue under uniform standards.

I respectfully dissent.

The Court’s decision in Bush v. Gore became the final chapter in the presidential election controversy of 2000. By stopping the Florida recount, the Court removed Vice President Gore’s last hope of capturing the state’s twenty-five electoral votes and guaranteed that Governor Bush would become the next president (see Box 4-2).

Although much of the nation was happy to see the election finally resolved, the Court’s action caused intense debate in political and academic circles. Not

BOX 4-2

Aftermath . . . Bush v. Gore

THE ANNOUNCEMENT of the Supreme Court’s decision in Bush v. Gore (2000) effectively ended the 2000 presidential election controversy. On December 13, 2000, the day after the justices ruled, Vice President Al Gore announced that he was ending his campaign: “I accept the finality of this outcome. . . . And tonight, for the sake of our unity as a people and the strength of our democracy, I offer my concession.” Florida officials quickly certified the state’s twenty-five electoral votes for Texas governor George W. Bush.

Florida’s electoral votes gave Bush a total of 271 in the Electoral College, just one more than required to become the forty-third president of the United States. Bush became only the fourth president in U.S. history to win office while losing the popular vote to his chief opponent: Gore captured 48.39 percent of the popular vote, as opposed to Bush’s 47.88 percent. Before Bush only John Quincy Adams in 1824, Rutherford B. Hayes in 1876, and Benjamin Harrison in 1888 had been elected president without leading in the popular vote count. (Some political scientists have argued that Richard Nixon won the popular vote in the election of 1960, but he lost the election to John F. Kennedy. See footnote 3.)

Because of the voting controversies in Florida, many states revised election laws and upgraded vote-counting equipment to avoid similar problems in future elections. The two Florida officials at the center of the controversy, Governor Jeb Bush and Secretary of State Katherine Harris, continued their political careers. Jeb

(Continued)
only was there a question of whether the Supreme Court should have heard the case in the first place, but also many believed, for the reasons we noted earlier, that the justices’ votes were excessively influenced by their own partisan or ideological preferences. Do you agree?

Finally, return to the issue we raised earlier about reforming the system for electing the president. Naturally enough, calls for reform came in the wake of Bush v. Gore, with some observers questioning the wisdom of allowing nine unelected justices to resolve the nation’s most important election. With the election of Donald Trump in 2016, proposals to eradicate the Electoral College have reemerged. Like Bush in 2000, Trump won the electoral vote but lost the popular vote, this time by over 2.8 million votes—a far larger margin than the 540,000 or so votes that separated Bush and Gore.6

Removal of the President

Although the framers spent some time dealing with presidential selection, they apparently agreed rather quickly about removal. If an incumbent president (or vice president) abuses the office, the Constitution provides for impeachment as the method of removal. Impeachment is a two-stage process. First, the House of Representatives investigates the charges against the incumbent. The Constitution stipulates that the president (as well as the “Vice President and all civil Officers of the United States”) “shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” Once convinced that there is sufficient evidence of such misconduct, the House passes articles of impeachment specifying the crimes charged and authorizing a trial. The second stage, the trial, takes place in the Senate, with the chief justice of the United States presiding. Conviction requires the agreement of two-thirds of the voting senators. The Constitution specifies that the chief justice shall preside over the Senate if it tries the president, but not when the vice president is being impeached. Could this mean that a vice president, acting as president of the Senate, may preside over his or her own impeachment? That is unlikely, but the procedures are not altogether clear because no vice president has ever been impeached by the House of Representatives.

Finally, Congress may impose no penalty on a convicted official other than removal from office. The former officeholder may, however, be subject to separate criminal prosecution in the courts.

Congress has never removed a president from office, but three have barely escaped such a fate. Andrew Johnson was impeached by the House in 1868, and he survived his trial in the Senate by one vote. Richard Nixon was well on his way to being impeached in 1974 when he resigned from office. The House passed two articles of impeachment against Bill Clinton in 1998, and the Senate vote in February 1999 fell far short of the sixty-seven votes of guilt needed to convict. Because the Nixon and Clinton episodes led to several important constitutional rulings on executive power, we have more to say about the circumstances surrounding these presidents’ troubles in the coming pages.

Worth noting here, though, is that none of these episodes have resolved the grounds for impeachment. The Constitution specifies impeachment for “Treason, Bribery, or other high Crimes and Misdemeanors,” as we just noted. But what do those words mean? Must the president violate a criminal law to be impeached or is, say, slander—making false and damaging statements—enough, even though slander is not a criminal offence? Can Congress impeach the president for actions he takes in his “private” life outside of his official duties, or must the offenses trace directly to his job?

Scholars and other commentators debate the answers to these other questions, with each side developing answers from various and rather murky historical material. Perhaps, though, President Gerald Ford supplied the most politically accurate answer when he, as a member of the House of Representatives, led the charge to impeach Justice William O. Douglas. In response to claims that the impeachment effort was driven by Douglas’s liberal decisions and not judicial misconduct, Ford said:

What, then, is an impeachable offense? The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the [Senate] considers to be sufficiently serious to require removal of the accused from office . . . there are few fixed principles from among the handful of precedents.8

Tenure and Succession

The Constitution sets the presidential term at four years. Originally, it placed no restriction on the number of terms a president could serve. George Washington began the tradition of a two-term limit when he announced at the end of his second term that he would not run again. Every president honored this tradition until the Roosevelts. After serving two terms in office, Theodore Roosevelt decided against running for a third term in the election of 1908. But four years later he had a change of heart and ran as a third-party candidate; he lost to Woodrow Wilson. His cousin, Franklin Roosevelt, had better luck. He sought and won election to a third term in 1940 and to a fourth term in 1944. In reaction, Congress proposed the Twenty-second Amendment, which held that no person could run for president after having served more than six years in that office. The states ratified the amendment in 1951.

In Article II the framers provided a mechanism for the replacement of the president in the event of death, resignation, or disability: the vice president assumes the powers and responsibilities of the office.9 The Constitution further authorizes Congress to determine presidential succession if there is no sitting vice president when a vacancy occurs.

In 1965 Congress recommended additional changes in the Constitution to govern presidential succession. The need became apparent after Lyndon Johnson assumed the presidency following John F. Kennedy’s assassination in 1963. Johnson’s ascension left the vice presidency vacant. If anything had happened to Johnson, the federal succession law dictated that next in line was

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8From a speech in the House of Representatives on April 15, 1970.
9Nine sitting presidents have failed to complete their terms. Four (William Henry Harrison, Zachary Taylor, Warren G. Harding, and Franklin D. Roosevelt) died of natural causes, and four (Abraham Lincoln, James A. Garfield, William McKinley, and John F. Kennedy) were assassinated. One (Richard Nixon) resigned from office.

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the Speaker of the House, followed by the president pro tempore of the Senate (see Box 4-3). At the time of the 1964 election, the Speaker was seventy-three-year-old John McCormack (D-Mass.), and the president pro tempore was eighty-seven-year-old Carl Hayden (D-Ariz.). Perhaps believing that neither would have been capable of handling the demands of the presidency, Congress proposed that the Constitution be amended to provide that when a vacancy occurs in the office of vice president, the president nominates a new vice president, who takes office upon confirmation by majority vote in both houses of Congress. The proposal also clarified procedures governing those times when a president is temporarily unable to carry out the duties of the office.

The change was ratified by the states as the Twenty-fifth Amendment in 1967.

It was not long before the country used the procedures outlined in the Twenty-fifth Amendment. In 1973 Vice President Spiro Agnew resigned when he was charged with income tax evasion stemming from alleged corruption during his years as governor of Maryland. Nixon nominated, and Congress confirmed, Representative Gerald R. Ford of Michigan to become vice president. Just one year later, Nixon resigned the presidency, and Ford became the nation’s first unelected chief executive. Ford selected Nelson Rockefeller, former governor of New York, to fill the new vacancy in the vice presidency.
ON MARCH 30, 1981, President Ronald Reagan was shot by would-be assassin John Hinckley outside a Washington hotel and rushed to an area hospital for surgery. Vice President George H. W. Bush was on a plane returning to Washington from Texas. Presidential aides and cabinet members gathered at the White House, where questions arose among them and the press corps about who was “in charge.” In the press briefing room Secretary of State Alexander M. Haig Jr. told the audience of reporters and live television cameras, “As of now, I am in control here in the White House, pending the return of the vice president. . . . Constitutionally, gentlemen, you have the president, the vice president, and the secretary of state.”

Haig was, as many gleeful critics subsequently pointed out, wrong. The Constitution says nothing about who follows the vice president in the line of succession. The Succession Act of 1947 (later modified to reflect the creation of new departments) establishes congressional leaders and the heads of the departments, in the order the departments were created, as filling the line of succession that follows the vice president.

The line of succession is as follows:

- Vice president
- Speaker of the House of Representatives
- President pro tempore of the Senate
- Secretary of state
- Secretary of the Treasury
- Secretary of defense
- Attorney general
- Secretary of the interior
- Secretary of agriculture
- Secretary of commerce
- Secretary of labor
- Secretary of health and human services
- Secretary of housing and urban development
- Secretary of transportation
- Secretary of energy
- Secretary of education
- Secretary of veterans affairs
- Secretary of homeland security

A different “line”—not of succession to the presidency but of National Command Authority in situations of wartime emergency—was created according to the National Security Act of 1947. The command rules are detailed in secret presidential orders that each new president signs at the beginning of the term. Among other things, the orders authorize the secretary of defense to act as commander in chief in certain specific, limited situations in which neither the president nor the vice president is available. Presumably, such situations would follow a nuclear attack on Washington, D.C.


Constitutional Authority

The Constitution expressly gives the president powers in the domestic and foreign realms. Enumerated domestic powers include the following:

- To propose (“recommend”) laws to Congress (Article II, Section 3)
- To sign or veto bills passed by Congress (Article I, Section 7)
- To appoint judges and other government officers (with the “advice and consent” of the Senate) and to make recess appointments (Article II, Section 2)
- To “grant Reprieves and Pardons for Offenses against the United States” (Article II, Section 2)
- To “take Care that the Laws be faithfully executed” (Article II, Section 3)

In foreign affairs, the president’s express powers include the following:

- To be “Commander in Chief of the Army and Navy of the United States” (Article II, Section 2)
- To “make Treaties” with the concurrence of two-thirds of the Senate (Article II, Section 2)
- To “appoint Ambassadors [and] other public Ministers and Consuls (“with the Advice and Consent of the Senate”) (Article II, Section 2)
- To “receive Ambassadors and other public Ministers” (Article II, Section 3)

In this chapter and the next, you will have ample opportunity to consider these powers because virtually all have been the subject of litigation in the Supreme Court. For now, we wish to make only a few general points that you should keep in mind as you read the cases to come.

First, we have divided the powers into domestic and foreign, reflecting the perspective of political scientists who suggest that there are actually two “presidencies”: one for domestic affairs and one for foreign policy. But this line is not always so clear. Consider President Trump’s 2018 announcement that he would impose tariffs on imported steel. Imposing tariffs could be seen as an example of the president taking “Care that the Laws be faithfully executed” because various congressional acts give the president authority to impose tariffs. But tariffs—in essence, taxes imposed on imports from other countries—also have implications for foreign relations.

Second, all the president’s key powers are listed in Article II with one notable exception: the authority to sign or veto bills passed by Congress, which is in Article I. The suggestion here is that Congress has primary authority to make laws but the president can check that authority by refusing to sign bills (though Congress can stop the president from so doing by overriding his veto). The power to appoint judges and other government officials works in the reverse. This appointment power falls under the president’s Article II authority, but the Senate can block the president’s choices by declining to confirm them (it can also refuse to ratify treaties the president makes).

Finally, notice the difference in wording in some of the powers listed earlier. Some seem quite specific, such as the president’s power to “grant Reprieves and Pardons for Offenses against the United States,” while others are more ambiguous. Consider the president’s power to act as “Commander in Chief of the Army and Navy of the United States.” Does that language apply only to international conflicts, or does it also have bearing on domestic concerns? For example, could the executive branch take over the nation’s steel mills because the president needs steel for a war effort? Even the vesting clause of Article II—“The executive Power shall be vested in a President . . .” —raises questions: What did the framers mean by the term executive power? Did they use that term simply to summarize the powers in Article II or as a general grant of power to the president?

As you will see in the pages to come, the Supreme Court has attempted to provide answers to these questions and, along the way, clarify the president’s authority. Attempts at clarification, we hasten to note, have come in cases involving seemingly vague powers as well as in those where the constitutional language is quite specific. It may seem clear that the president can grant pardons for “Offenses against the United States,” but does his pardon power extend to criminal contempt penalties imposed by a federal judge? Would pardoning a person

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10For different answers to this question, compare the majority, concurring, and dissenting opinions in Youngstown Sheet & Tube Co. v. Sawyer (1952), excerpted in Chapter 5.
The Tools of Presidential Power

This is but one example of the kinds of questions the Court has addressed. Before turning to the Court’s answers, let’s consider the tools available to the president to exercise his authority. For some powers, the tools are obvious. For example, after Congress passes a bill, Section 7 of Article I commands the president to sign the bill if he approves of it; if he disapproves he can veto it, noting “his Objections to that House in which it shall have originated.” In this case the president’s tools are signing or vetoing (with objections).

But how does the president exercise his primary function to execute the law? The answer to this question seems far less obvious than it is for the other branches of government. Article I tells us that Congress performs its primary function by passing bills, and Article III suggests that the courts exercise theirs by hearing and deciding disputes. Article II is silent on how the president should execute the law and so presidents have developed various tools to perform their job. We consider four: executive orders, military orders, signing statements, and public communications.

Executive Orders. On June 8, 1789, President George Washington sent a “communique” to officers from the pre-Constitution government asking each to prepare a report “to impress me with a full, precise, and distinct general idea of the affairs of the United States.” According to many commentators, Washington thought he had the authority to issue this directive under Article II’s vesting clause, as well as its command that the president “shall take Care that the Laws be faithfully executed.”

Such presidential directives became the norm. And though they come in different forms, “executive orders” are the oldest—with Washington’s considered the first. That’s because his meets the usual definition of an executive order: an order directed to people who work in the executive branch aimed at ensuring they execute and enforce the laws in line with the president’s priorities. In Washington’s day, these people were few in number—only four cabinet secretaries with minimal (if any) staff. No longer. Today there are fifteen executive departments—including the Departments of Agriculture, Education, and State—each headed by a cabinet secretary; there are also hundreds of agencies and commissions, all located in the executive branch. All told about 2 million people work in the executive branch.

Since 1789, every president has issued executive orders, from Washington’s 8 (about one a year) to Obama’s 276 (about 35 a year). (Through early 2018, Trump issued 63 orders, or about 54 a year.) Today, the procedure for issuing them is straightforward: after the president signs the order, he sends it to the Office of the Federal Register, which numbers and publishes it in the Federal Register. Usually the president will state the constitutional or statutory authority that serves as the basis for his order. When he issued his initial order limiting entry of nationals from seven countries into the United States (the “travel ban”), President Trump pointed to the “authority vested in me by the Constitution and the laws of the United States of America,” including various immigration acts. But there are no formal criteria the president must meet before signing an executive order or even repealing a former president’s order. He need not, for example, send it to Congress for approval.

But there are still checks on executive orders. First, the department or agency to which the order is directed need not follow it. The problem for the president is that when Congress created the various agencies, it gave them, not the president, regulatory authority. Providing an example is the Environmental Protection Agency (EPA). Among its responsibilities is to help implement the Clean Water Act by devising pollution control programs and standards. To this end, the Obama-era EPA

15With one exception: William Henry Harrison, who died of pneumonia a month after taking office.
16Data on the number of executive orders are from http://www.presidency.ucsb.edu/data/orders.php.
17For more on this point, see Lisa Manheim and Kathryn Watts, The Limits of Presidential Power (Amazon Digital Services, 2018).

authority . . . to recognize foreign states.” Likewise, in 2011, after agreeing to a budget compromise law, President Barack Obama declared his intention to ignore a section of the law that prohibited the use of appropriations for four executive branch “czars.” In his first year and a half in office, Trump issued twelve signing statements, including one on a 2017 law that imposed sanctions on Iran, North Korea, and Russia. Trump signed the bill but wrote: “While I favor tough measures to punish and deter aggressive and destabilizing behavior [in these countries] . . . Congress included a number of clearly unconstitutional provisions” including those that “purport to displace the President’s exclusive constitutional authority to recognize foreign governments.”

On what authority did Bush, Obama, Trump, and, in fact, all other presidents since James Monroe issue these statements? Although the Constitution contains no specific authorization, some presidents have pointed to their Article II power to “take Care that the Laws be faithfully executed.” If so, then the president seems to saying, “I will not execute or enforce provisions of a law I believe to be unconstitutional.” Signing statements also represent a form of constitutional interpretation by the president. Well before the Supreme Court can rule on a law, assuming it ever does, the president’s views on the constitutionality of particular portions of it have been made public.

What have the justices had to say about this practice? Not much, as it turns out. Although signing statements have been the subject of lower court litigation, they have not faced a constitutional challenge in the Supreme Court. Moreover, the justices have virtually ignored these statements in their review of federal laws. In only a handful of cases has the Court cited, much less relied on, presidential signing statements to interpret legislation.

But pressure may be building within the Court to pay greater heed to the practice. In Hamdan v. Rumsfeld (2006), Justice Antonin Scalia, in condemning the Court’s use of legislative history to interpret a law, chided the majority for “wholly ignor[ing] the President’s signing statement, which explicitly set forth his understanding” of the law at issue. An “understanding,” he might add, with which Scalia agreed but the majority did not. Perhaps taking heed of Scalia’s objection, the majority mentioned Bush’s signing statement when the earlier-mentioned passport law was challenged in Zivotofsky v. Kerry (2015) (excerpted in Chapter 5), though Justice Scalia, in dissent, did not.

So far, we are left with more questions than answers. Will the justices now become more attentive to signing statements when they interpret or review the constitutionality of federal laws? Should they? And what about the practice itself, especially its implications? Prior to a federal court decision, are presidents obligated to execute statutory provisions that they believe are unconstitutional? If so, should they not issue signing statements? Finally, does the use of signing statements undermine Marshall’s view that it is the judiciary’s job to say what the law is? We leave these questions for you to consider as you read the material and cases to follow here and in Chapter 5.

Public Communications. Presidents have many other methods for communicating how they will execute laws. They can hold press conferences, give interviews to the press, and take to social media. Trump is an active user of Twitter, having tweeted thousands of times since taking office. Many of his tweets are little more than notes of congratulations or expressions of support for political allies. But in some tweets he has attempted to explain, expand, or offer commentary on particular policies or executive orders, as some commentators allege he did after issuing the executive order instituting the travel ban. For example, after Trump retweeted three anti-Muslim videos, members of his administration connected them to the travel ban.21

Should tweets and other public statements have a role in Court decisions? In Trump v. Hawaii (2018), in which the Court considered the travel ban, the justices seemed to answer in the affirmative: tweets and the like (“extrinsic evidence”) sometimes can be used to determine whether or not government action is “inexplicable by anything but animus” (here “bare . . . desire to harm a politically unpopular group?”22), as Justice Anthony Kennedy wrote in a concurring opinion. In the case of the travel ban, the majority found that legitimate purposes motivated the ban—notably, national security—and so an inquiry into animus was unnecessary. Justice Sonia Sotomayor disagreed. Writing in dissent, she took Trump’s tweets and other public statements as “strong evidence that impermissible hostility and animus motivated the Government’s policy.”

22Department of Agriculture v. Moreno (1973).
THE FAITHFUL EXECUTION OF THE LAWS: DEFINING THE CONTOURS OF PRESIDENTIAL POWER

With that background in mind, let’s turn to how the Supreme Court has interpreted the powers of the president, beginning with Article II’s vesting clause—“The executive Power shall be vested in a President...”—and return to a question we raised earlier: What did the framers mean by the term executive power? There are two possibilities: (1) a mere designation of office or (2) a general grant of power.

The “mere designation” view holds that the first sentence of Article II simply summarizes the powers listed later on. That is, the president is limited to those specific grants of power contained in Sections 2 and 3 of Article II. This was the position James Madison implied in Federalist No. 51 and that President William Howard Taft advocated:

The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest.

Is there any constitutional or historical basis for this position? A common piece of support is based on pure logic: Why would the framers bother to list specific powers, as they did in Article II, if they meant for the president to have more powers than those they enumerated?

Alexander Hamilton in Federalist No. 70 and other advocates of the “general grant of power” view, which some scholars call the stewardship theory, take a much different position. On their account, the president has all the powers listed in Article II plus those additional powers needed to run the nation—regardless of whether the Constitution specifically authorizes their exercise. In other words, as long as neither the Constitution nor Congress has restricted the president from doing something for the common good, the president may do it. Seen in this way, the term executive power in Article II is a general grant of power to the president, who must exercise that power in ways that best serve the nation. As President Theodore Roosevelt, an advocate of this view, put it,

The most important factor in getting the right spirit in my Administration, next to the insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers. My view was that every executive officer, and above all every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it.

How do proponents of this view justify it? One way is through an appeal to common sense: as the only national leader who is available twenty-four hours a day, the president must be able to exercise personal judgment in addressing any problems that may arise. To do so, the president must have the latitude to deal with situations that the framers never envisioned. Another response relies on the takes care clause of Article II, Section 3, which states that the president shall be given the responsibility to “take Care that the Laws be faithfully executed.” To carry out this command, adherents of the stewardship theory argue, the president must have powers that go beyond those explicitly enumerated in Article II.

If the debate between these two camps reminds you of the controversy between Jefferson and Hamilton over the creation of the Bank of the United States and, more generally, over congressional powers, you would not be

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1William Howard Taft, Our Chief Magistrate and His Powers (New York: Columbia University, 1916), 139–140. Taft may have been a proponent of the “mere designation” view, but he did not advocate a weak president. In fact, Taft’s opinion in Myers v. United States (1926) suggests that he was a proponent of the unitary executive theory, which we discuss later in the chapter.

wrong. Just as Jefferson argued that the Constitution limits Congress to enumerated powers, advocates of the mere designation approach suggest that the president can exercise only the powers listed in Article II. And just as Hamilton asserted that the necessary and proper clause of Article I provides Congress with some degree of flexibility, adherents of the stewardship theory argue that the take care clause of Article II enables the president to exercise powers beyond those listed in Article II.

Which view would the Court adopt? The justices provided one answer in the important case of \textit{In re Neagle} (1890).\textsuperscript{25} The appeal presenting this case was based on one of the more bizarre and twisted stories in constitutional history. The dispute began some three decades before the case reached the Supreme Court. When the trial court reviewed the essential facts, the telling took more than five hundred pages. As you read this decision, consider the extent to which you think the Court’s response was influenced by the fact that one of its own members had been threatened.

\textbf{Sarah Althea Hill Terry, wife of David Terry and central figure in the dispute with Justice Stephen Field that led to the killing of her husband.}

\textbf{David S. Terry, former California state supreme court judge.}

\textbf{Stephen J. Field, associate justice of the U.S. Supreme Court, 1863–1897.}

\textsuperscript{25}The docket title of this case is \textit{Thomas Cunningham, Sheriff of the County of San Joaquin, California, Appellant v. David Neagle.}
**In re Neagle**

135 U.S. 1 (1890)


Vote: 6 (Blatchford, Bradley, Brewer, Gray, Harlan, Miller)

2 (Fuller, Lamar)

OPINION OF THE COURT: Miller

DISSENTING OPINION: Lamar

NOT PARTICIPATING: Field

**FACTS:**

Stephen J. Field and David S. Terry both went to California during the 1849 gold rush—Field from New England and Terry from the South. Both became judges on the California Supreme Court, with Terry its chief judge. In 1859 a bitter dispute erupted between Chief Judge Terry and David Broderick, a U.S. senator. Terry resigned his position, challenged Broderick to a duel, and killed him. Field had been a close friend of Broderick, and he vowed never to forget the killing. Field was then elevated to the chief justiceship of the state court, and four years later President Abraham Lincoln appointed him to the U.S. Supreme Court.

Terry went into private practice and eventually came to represent Sarah Althea Hill in a divorce action. Hill claimed to be the wife of William Sharon, a former U.S. senator from Nevada, who was a millionaire mine operator and hotel owner. Hill charged Sharon with adultery and sued for divorce, but Sharon denied ever having married her. Many believed that she was just another in a long line of mistresses Sharon had after his wife died. Sarah Hill claimed to have a document proving the marriage was valid, but during the divorce hearing the court ruled the document to be a forgery and dismissed her action.

When William Sharon died, his son Frederick took legal action to dismantle any claim Sarah Hill had.

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to his father’s estate. Attorney Terry by this time had fallen in love with his beautiful client (and perhaps with her potentially large inheritance) and married her. As chance would have it, in September 1888 Justice Field was assigned to a three-judge circuit court to decide the suit brought by Frederick Sharon against Sarah Terry. When the judges announced their ruling in favor of Sharon, violence erupted in the courtroom. Sarah Terry shouted accusations that Field had been bribed to reach his decision. Field ordered the marshals to remove her, and David Terry, defending his wife, struck a marshal and knocked out a tooth. He also brandished a bowie knife, and Sarah attempted to pull a revolver from her purse. The marshals subdued both of them. Sarah Terry was sentenced to one month in jail for contempt, and David Terry to six months in jail.

During his imprisonment, Terry’s hatred of Field festered. On several occasions and before numerous witnesses, he pledged to horsewhip and then kill Field if the justice ever returned to California. Sarah Terry also threatened to kill Field. In response, President Benjamin Harrison and the U.S. attorney general decided to provide protection for Justice Field on his next judicial visit to California. The administration authorized a federal marshal, David Neagle, to act as Field’s bodyguard when the justice was on circuit court duty in California.

Field returned to California in the summer of 1889, and Neagle was with him at all times. Traveling from Los Angeles to San Francisco by train, Field disembarked at Lathrop to eat breakfast in the station dining room. The Terrys, who had been on the same train, entered the dining room and saw him. Sarah returned to the train to get her revolver, while David walked up behind Field, slapped him twice on the side of the face, and raised his fist for a third blow. Neagle immediately rose from his seat with his revolver drawn and ordered Terry to stop. Terry reached into his coat, and Neagle, fearing that he was going for a weapon, fired two shots, one to the chest and the other to the head, killing him. When Terry’s body was searched, no weapons were found.

Sarah Terry, who was to spend her last forty-five years in a state mental institution, claimed that Neagle, in conspiracy with Field, murdered her husband. She was sufficiently convincing that the bodyguard was arrested and charged with murder. Charges also were filed against Field as an accomplice, but they were later dropped.

A federal court granted a writ of habeas corpus ordering state authorities to release Neagle, and California appealed. The central question was whether the president, without congressional action, could issue an executive order through the U.S. attorney general to authorize a bodyguard to protect Justice Field. If he did, then Neagle likely had authority to act as he did; if not, he could be tried for murder in California.

ARGUMENTS:

For the appellant, Thomas Cunningham, Sheriff of San Joaquin County, California:

- Under California law, Neagle’s rights to use force to protect Justice Field were limited to protecting him within the courthouse. Neither the president nor the attorney general has the power to authorize Neagle to guard Field outside the courthouse.
- If the president has any such power, what is its source? If the president has power, within the jurisdiction of the several states, to assign a bodyguard to all federal officials, he has power to place a marshal in the house of every American citizen to shield him from harm at the hands of his fellow citizens. And, if it has come to this, what use do we have for state governments?

For the appellee, David Neagle:

- The president is constitutionally required to “take care that the laws be faithfully executed,” and that clause invests in the president implied powers beyond expressly listed executive powers in the Constitution, independent of congressional statutes.
- The doctrine of necessary and implied powers is not limited to Congress. On the contrary, because the Constitution invests the president with executive power and confers on him the power to “take care that the laws be faithfully executed,” it gives him all power reasonably incident to exercise the executive function and necessary to enforce the laws. As long as the power has not been withheld from him by the Constitution and flows from the Constitution, the power is his.
- It was the duty of the executive branch to guard and protect the life of Justice Field in the discharge of his duty because protection of courts and judges is essential to the very existence of the government, as the framers emphasized in The Federalist Papers.
The justices of the Supreme Court have been members of the Circuit Courts of the United States ever since the organization of the government, and their attendance on the circuit and appearance at the places where the courts are held has always been thought to be a matter of importance. In order to enable him to perform this duty, Mr. Justice Field had to travel each year from Washington City, near the Atlantic coast, to San Francisco, on the Pacific coast. In doing this he was as much in the discharge of a duty imposed upon him by law as he was while sitting in court and trying cases. . . .

Justice Field had not only left Washington and travelled the three thousand miles or more which were necessary to reach his circuit, but he had entered upon the duties of that circuit, had held the court at San Francisco for some time; and, taking a short leave of that court, had gone down to Los Angeles, another place where a court was to be held, and sat as a judge there for several days, hearing cases and rendering decisions. It was in the necessary act of returning from Los Angeles to San Francisco, by the usual mode of travel between the two places, where his court was still in session, and where he was required to be, that he was assaulted by Terry. . . .

The occurrence which we are called upon to consider was of so extraordinary a character that it is not to be expected that many cases can be found to cite as authority upon the subject. . . .

We have no doubt that Mr. Justice Field when attacked by Terry was engaged in the discharge of his duties as Circuit Justice of the Ninth Circuit, and was entitled to all the protection under those circumstances which the law could give him.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties; and that the language [of a federal law], that the party seeking the benefit of the writ of habeas corpus must in this connection show that he is “in custody for an act done or omitted in pursuance of a law of the United States,” makes it necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an act of Congress. It is not supposed that any special act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits, and act as a bodyguard to them, to defend them against malicious assaults against their persons. But we are of opinion that this view of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of habeas corpus to persons imprisoned for the performance of their duty. And we are satisfied that if it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited. . . .

In the view we take of the Constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is “a law” within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably. . . .

Where, then, are we to look for the protection which we have shown Judge Field was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States; because, as has been more than once said in this court, in the division of the powers of government between the three great departments, executive, legislative and judicial, the judicial is the weakest for the purposes of self-protection and for the enforcement of the powers which it exercises. The ministerial officers through whom its commands must be executed are marshals of the United States, and belong emphatically to the executive department of the government. They are appointed by the President, with the advice and consent of the Senate. They are removable from office at his pleasure. They are subjected by act of Congress to the supervision and control of the Department of Justice, in the hands of one of the cabinet officers of the President, and their compensation is provided by acts of Congress. . . .

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress.
If we turn to the executive department of the government, we find a very different condition of affairs. The Constitution, section 3, Article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander in chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed." Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution? . . .

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through violence, even to death, in discharge of the duties which its laws impose upon them, be established, and Congress has made the writ of habeas corpus one of the means by which this protection is made efficient, and if the facts of this case show that the prisoner was acting both under the authority of law, and the directions of his superior officers of the Department of Justice, we can see no reason why this writ should not be made to serve its purpose in the present case. . . .

The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

We therefore affirm the judgment of the Circuit Court authorizing his discharge from the custody of the sheriff of San Joaquin County.

MR. JUSTICE LAMAR (with whom concurred MR. CHIEF JUSTICE FULLER) dissenting.

[We deny that upon the facts of this record, Neagle, as deputy marshal Neagle, or as private citizen Neagle, had any duty imposed on him by the laws of the United States growing out of the official character of Judge Field as a Circuit Justice. We deny that anywhere in this transaction, accepting throughout the appellee's version of the facts, he occupied in law any position other than what would have been occupied by any other person who should have interfered in the same manner, in any other assault of the same character, between any two other persons in that room. In short, we think that there was nothing whatever in fact of an official character in the transaction, whatever may have been the appellee's view of his alleged official duties and powers; and, therefore, we think that the courts of the United States have in the present state of our legislation no jurisdiction whatever in the premises, and that the appellee should have been remanded to the custody of the sheriff. . . .

The gravamen of this case is in the assertion that Neagle slew Terry in pursuance of a law of the United States. He who claims to have committed a homicide by authority must show the authority. If he claims the authority of law, then what law? And if a law, how came it to be a law? Somehow and somewhere it must have had an origin. Is it a law because of the existence of a special and private authority issued from one of the executive departments? So in almost these words is claimed in this case. Is it a law because of some constitutional investiture of sovereignty in the persons of judges who carry that sovereignty with
them wherever they may go? Because of some power inherent in the judiciary to create for others a rule or law of conduct outside of legislation, which shall extend to the death penalty? So, also, in this case, . . . it is claimed. We dissent from both these claims. There can be no such law from either of those sources. The right claimed must be traced to legislation of Congress; else it cannot exist.

In Neagle the Court adopted the “general grant” perspective of executive power. The justices held that the president has the constitutional power to take those actions necessary to enforce the laws of the nation, even if the Constitution does not provide an explicit authorization for doing so.

Strong support from the Court for this view came again in an 1895 case, In re Debs. In May 1894 President Grover Cleveland sent troops into Chicago to stop striking train workers from obstructing the movement of the U.S. mails, and he had his attorney general secure a court injunction against the striking workers. When the workers defied the injunction and violence erupted, their leader, Eugene Debs, was cited for contempt. Debs, in turn, challenged the injunction, claiming that the president could not obtain it in the absence of explicit congressional authorization. The justices disagreed: “Every government, entrusted, by the very terms of its being, with powers and duties to be exercised . . . for the general welfare, has the right to apply to its own courts for any proper assistance.” Moreover, because the strike adversely affected the public, the president could forbid it.

**Congressional Limitations on Executive Power**

Debs and Neagle are examples of rulings that allow the president to take action without explicit approval from Congress or the Constitution—and, therefore, support the stewardship approach to the presidency. But the Court has also placed at least two types of limits on presidential prerogative.

The first—what we call the congressional limit—is well illustrated by Youngstown Sheet & Tube Company v. Sawyer (1952), also known as the Steel Seizure Case (excerpted in Chapter 5). In December 1951 the United Steelworkers Union announced that it would call a strike at the end of the month. Because the nation was engaged in a war in Korea and steel was needed in the production of arms and other military equipment, President Harry S. Truman was not about to let a strike shut down the mills. Only hours before the strike was to begin, Truman issued an executive order commanding Secretary of Commerce Charles Sawyer to seize the nation’s steel mills and keep them in operation. Sawyer in turn ordered the mill owners to continue to run their facilities as operators for the United States.

Truman’s seizure order cited no statutory authority for his action because there was none. Federal statutes permitted government seizure of industrial plants for certain specified reasons, but the settlement of a labor dispute was not one of them. In fact, the Taft-Hartley Act of 1947 rejected the idea that labor disputes could be resolved by such means. Instead, the act authorized the president to impose an eighty-day cooling-off period as a way to postpone any strike that seriously threatened the public interest. Truman, however, had little regard for the Taft-Hartley Act, which Congress had passed over his veto. The president ignored the cooling-off period alternative and took the direct action of seizing the mills. The inherent powers of the chief executive, he maintained, were enough to authorize the action.

A divided Supreme Court disagreed. Two members of the Court (Douglas and Black) adopted the mere designation or enumerated approach; they wrote, “The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.” Three justices (Vinson, Reed, and Minton) took the opposite position. In their opinion, the take care clause provided the president with a sufficient constitutional basis for his actions: he was taking steps that were in the best interest of the country until Congress could act. Finally, a plurality of four (Burton, Clark, Frankfurter, and Jackson) settled somewhere between the two extremes. Unlike Black and Douglas, they asserted that the president has powers beyond those enumerated in Article II. But, in contrast to Vinson, Reed, and Minton, they argued that President Truman could not seize the mills because he had acted against the “implied” desires of Congress. As Jackson put it in a landmark concurring opinion, “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at the lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”

Despite these divisions, the lesson from Youngstown—especially Jackson’s concurrence—is clear: presidential powers may not be fixed, but the president can act against the will of Congress only if the president can show that the power he is asserting...
conclusively and exclusively belongs to him.\(^7\) The situation confronting the Court becomes murkier, however, when Congress has not explicitly approved or disapproved of presidential action. We have more to say about that situation in Chapter 5, in which we discuss the relative powers of the president and Congress over foreign affairs and in times of national emergencies, such as the 2001 terrorist attacks on New York City and Washington, D.C.

The Obligation to Enforce the Law

Another limit on presidential power centers on the lack of enforcement of the laws. Simply put, the Constitution obliges the president to enforce all the laws, not just those the administration supports. Although a number of presidents have been criticized for failing to carry out certain laws with sufficient enthusiasm, it would be difficult to show that the chief executive had not satisfied the constitutional mandate of faithful execution. On rare occasions, however, a president has openly refused to execute a law validly passed by Congress. In such cases court challenges are to be expected.

Train v. City of New York (1975) provides an example. At issue was the Federal Water Pollution Control Act Amendments of 1972, which Congress passed over President Nixon’s veto. The act made billions of dollars in federal money available to local governments for sewers and clean water projects. After losing the legislative battle, the president instructed the administrator of the Environmental Protection Agency (EPA) not to allot to local governments the full funds authorized by Congress. For example, for fiscal year 1973 Nixon directed officials to spend no more than $2 billion when Congress authorized as much as $5 billion for that year.

New York City, which expected to be a recipient of some of these funds, filed suit against Train, head of the EPA, to force the administration to release the impounded money. In interpreting the legislation, the Supreme Court in Train found no congressional grant of discretion to the president that would allow him to decide how much of the appropriated money to allocate. If the absence of such a grant, the president’s obligation was to carry out the terms of the statute: the funds, the Court held, must be distributed according to the intent of Congress.

\(^7\)This happened in Zivotofsky v. Kerry (2015), in which the president claimed “exclusive” and “conclusive” power to “receive Ambassadors and other public Ministers.” We consider this case in Chapter 5.

Train has come to stand for the proposition that the president cannot “frustrate the will” of Congress by destroying a program through impoundment; he must enforce and administer the policies enacted by the legislature (even if he opposes them) to fulfill his constitutional requirement to execute the laws. But some commentators wonder about the reach of Train because of the facts surrounding it: Nixon had vetoed the bill, substantial amounts of money were at stake, and the law did not seem to give the president discretion to reduce the amount allocated. Whether a different set of facts would lead the Court to give the president more leeway remains an open question.

Failure to enforce the law is one thing. It is quite another when administrations have chosen not to defend the constitutionality of particular federal laws. For example, in Myers v. United States (1926), which we will consider soon, the administration’s solicitor general not only refused to defend the law at issue (curtailing presidential authority to fire a postmaster) but also argued against its constitutionality. Myers is not all that unusual. Between 2004 and 2010 alone the Justice Department declined to defend statutes in nearly fifteen cases,\(^28\) and the Trump administration has followed suit, refusing to defend the constitutionality of provisions of the Affordable Care Act (“Obamacare”).

When the administration takes this position, criticism usually follows, as it did when Barack Obama’s attorney general announced that the president would not defend the constitutionality of the Defense of Marriage Act (DOMA), which defined marriage for federal purposes as the legal union between one man and one woman.\(^29\) Critics contend that the government has a duty to “take Care that the Laws be faithfully executed,” even if the president disagrees with those laws as a matter of policy. On the other side, presidents have argued that they take an oath to “preserve, protect, and defend” the Constitution and so have an obligation to make their own independent assessments of the constitutionality of federal laws, especially if those laws encroach on executive authority. In such a circumstance, the administration notifies Congress that it is not defending the law in question; Congress can then seek its own defense. In the case of DOMA, for example, the House of Representatives hired a former solicitor general, Paul Clement, to defend it.


DOMESTIC POWERS OF THE PRESIDENT

Executing the law is a general command to the president. But Article II also lists specific powers that belong to the president. In this section we examine the president’s domestic powers, and in the next we consider powers over external relations. Discussing the powers separately, as we noted earlier, reflects commentary suggesting two “presidencies”: one for domestic affairs and one for foreign policy. Although it is often hard to separate the two at times when one affects the other—with tariffs providing an example—differences remain. For example, some scholars argue that the president is generally more constrained—by the public, Congress, and even the Supreme Court—in domestic affairs than in the realm of foreign policy. As you read the material to come, as well as the cases and narrative in Chapter 5, consider whether this division makes sense today. Has the Supreme Court approved greater presidential power over foreign policy? More generally, what approaches have the justices taken to the specific powers of the president?

Veto Power

Section 7 of Article I of the Constitution contains what has become known as the presentment clause. By its terms, after Congress passes a piece of legislation, it is sent to the president, who then has three options: sign it, veto it, or do nothing. If the president signs it, the bill becomes law. If he vetoes it, Congress can attempt to override him by the required two-thirds vote. If he does nothing, the bill becomes law after ten days, provided that Congress is in session; if Congress adjourns during the ten-day period, the bill is “pocket vetoed.” Congress cannot override a pocket veto, but it can reintroduce the bill in its next session. Although presidents do not often use the pocket veto (since 1789, only 1,066 times, or about five times a year) or, for that matter, their regular veto power (since 1789, 1,508 times, or about seven times a year), they typically regard their option to do so as important. At the very least, a president can hold out the veto as a threat against a recalcitrant Congress, and Congress has generally been unwilling or unable to override a presidential veto. Of the 1,508 regular vetoes since 1789, only 111 have been overridden.

For much of American history, the veto power generated few constitutional disputes, but that is no longer true. Two issues relating to the veto have been the cause of major controversies. One, which we discuss in some detail in Chapter 5, is the legislative veto (when one or both houses of Congress attempt to veto decisions of the executive branch). The other is the line-item veto, which allowed the president to cancel particular taxing and spending provisions after they were signed into law. To understand why the line-item veto is controversial, think first about the way bills become laws: since the days of George Washington, Congress has passed laws and the president has had to decide whether to accept or reject them in their entirety. Most presidents have not been happy with this arrangement. Beginning with Ulysses S. Grant, virtually all have sought the ability to veto parts of a bill and accept others.

Among the rationales presidents have offered for the line-item veto, a common one is this: members of Congress face periodic electoral checks, and they often include in the federal budget “pork-barrel projects”—projects designed solely to appease constituents—even though such projects waste money. Because members of Congress are unwilling to take fiscal responsibility and omit unnecessary spending from the budget, the argument goes, the president should take on this responsibility by being able to veto or “cancel” particular expenditures.

In 1996 Congress finally agreed and enacted the Line Item Veto Act, which allowed the president to cancel certain tax and spending benefits after they had been signed into law. In 1997 the Court heard a challenge to the act, Raines v. Byrd, but dismissed the case because, according to the Court, the members of Congress who brought the suit lacked standing (see Chapter 2 and the excerpt here). In his concurring opinion, Justice David Souter expressed his belief that the day would eventually come when a party would suffer a sufficient loss of federal funds to maintain a suit.

That day came the very next term. In Clinton v. City of New York (1998), the justices found that the litigants had standing to challenge the Line Item Veto Act, and the Court decided the case on its merits. What did the majority decide? Do the justices make a compelling case for their position?


208 PART TWO • INSTITUTIONAL AUTHORITY
Clinton v. City of New York
Vote: 6 (Ginsburg, Kennedy, Rehnquist, Souter, Stevens, Thomas)
3 (Breyer, O'Connor, Scalia)

OPINION OF THE COURT: Stevens
CONCURRING OPINION: Kennedy
OPINION CONCURRING IN PART AND DISSENTING IN PART: Scalia
DISSENTING OPINION: Breyer

FACTS:
The Line Item Veto Act stated in part, [T]he President may, with respect to any bill or joint resolution that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States, cancel in whole—(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit; if the President—

(A) determines that such cancellation will—(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest; and

(B) notifies the Congress of such cancellation by transmitting a special message . . . within five calendar days (excluding Sundays) after the enactment of the law [to which the cancellation applies].

The act contained two other important provisions. First, although it gave the president the power to rescind...
various expenditures, it established a check on his ability to do so. Congress could consider “disapproval bills,” which would render the president’s cancellation “null and void.” In other words, Congress could restore presidential cuts, but new congressional legislation would be subject to a presidential veto. Second, the act stated, “Any Member of Congress or any individual adversely affected by [this act] may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution.”

On January 2, 1997, just one day after the act went into effect, six members of Congress who had voted against it brought suit in federal court against Secretary of the Treasury Robert E. Rubin and Franklin D. Raines, director of the Office of Management and Budget. The suit claimed that the act violated Article I of the Constitution because it “unconstitutionally expands the President’s power” and “violates the requirements of bicameral passage and presentment by granting to the President, acting alone, the authority to ‘cancel’ and thus repeal provisions of federal law.” The appellees further asserted that the act injured them “directly and concretely . . . in their official capacities” by (1) altering the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (2) divesting them of their constitutional role in the repeal of legislation, and (3) altering the constitutional balance of powers between the legislative and executive branches.

Attorneys for the executive branch officials argued that the legislators lacked standing to sue and that their claim was not ripe, meaning that the president had not yet used the new veto authority.

The lower court agreed with the members of Congress, and the executive branch officials appealed to the U.S. Supreme Court. Because the act directed the Court to hear as soon as possible any suit challenging its constitutionality, the justices established an expedited briefing schedule. They heard oral argument in Raines v. Byrd on May 27, 1997, a little more than a month after the lower court’s decision.

But, as you know from the discussion in Chapter 2, the Court dismissed the case. Writing for the majority, Chief Justice William H. Rehnquist held that the suit was not a real case or controversy because members of Congress were “not the right” litigants. After the Court’s decision, President Clinton invoked the line-item veto to cancel more than eighty items, including a provision of the Balanced Budget Act of 1997 that provided money for New York City hospitals and a section of the Taxpayer Relief Act of 1997 that gave a tax break to potato growers in Idaho. The affected parties immediately challenged these steps. Those in the first case were the City of New York, two hospital associations, one hospital, and two unions representing health care employees. The parties in the second were a farmers’ cooperative and one of its members.

A federal district court consolidated the cases, determined that at least one of the plaintiffs in each case had standing under Article III, and ruled that the Line Item Veto Act violated the presentment clause (Article I, Section 7, Clause 2). It also held that the law was an unconstitutional delegation of legislative powers to the president—an argument lawyers opposed to the line-item veto made before the Supreme Court. A majority on the Court thought it “unnecessary” to address this claim, but at least one of the justices, Kennedy in concurrence, seemed sympathetic. For this reason, we examine this aspect of Clinton, along with Kennedy’s concurrence, in Chapter 5 when we discuss the nondelegation doctrine.

ARGUMENTS:

For the appellants, William J. Clinton et al.:

- The Line Item Veto Act does not violate the presentment clause because the veto occurs after all the procedures in the presentment clause have been satisfied. Its title notwithstanding, the act does not authorize the president to sign into law some provisions of a tax or spending bill while “returning” other provisions to Congress. The president remains subject to the constitutional obligation to sign or return, in its entirety, a bill presented to him by Congress. His cancellation authority under the act comes into existence only after a tax or spending bill has been passed by both houses of Congress and approved, in toto, by the president.

- The scope of authority vested in the president by the act is consistent both with historical practice and with this Court’s decisions. Since 1789 Congress frequently has given the president discretion over the expenditure of appropriated funds. The Line Item Veto Act provides constitutionally sufficient limits on the president’s exercise of discretion over federal spending. The act requires the president to cancel items “in whole” rather than in part and to devote any canceled amounts to deficit reduction, and it provides meaningful guidance to the
president in his decision whether particular items should be canceled.

- Congress can specify that certain bills not be subject to cancellation, and the fact that it failed to do so in this case must be construed to be congressional intent to offer cancellation as an option to the executive.

For the appellees, City of New York et al.31

- The procedure set forth in Article I requires that every bill adding, amending, or repealing any provision of federal law be passed in the same form by both houses of Congress and presented to the president, who must sign, veto, or take no action with respect to each bill “in toto.” These requirements were carefully designed to assure that federal laws have the consent of the people as expressed through their elected representatives.

- The presentment clause requires the president to act on the bill as a whole to protect the principle of bicameralism and to limit the president’s power in the lawmaking process. Historically, this requirement has been clear since the first presidency, as found in Washington’s writings.

- Although cancellation occurs after the procedures prescribed in the presentment clause, the act is merely an attempt to accomplish indirectly what the Constitution prohibits accomplishing directly.

JUSTICE STEVENS DELIVERED THE OPINION OF THE COURT.

Less than two months after our decision in [Raines], the President exercised his authority to cancel one provision in the Balanced Budget Act of 1997 and two provisions in the Taxpayer Relief Act of 1997. Appellees, claiming that they had been injured by two of those cancellations, filed these cases in the District Court. That Court again held the statute invalid and we again expedited our review. We now hold that these appellees have standing to challenge the statute invalid and we again expedited our review. We now agree that the cancellation procedures set forth in the Act violate the Presentment Clause, Art. I, Sec. 7, cl. 2, of the Constitution. . . .

In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each. “[R]epeal of statutes, no less than enactment, must conform with Art. I.” INS v. Chadha (1983). There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes. Both Article I and Article II assign responsibilities to the President that directly relate to the lawmaking process, but neither addresses the issue presented by these cases. The President “shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient. . . .” Art. II, Sec. 3. Thus, he may initiate and influence legislative proposals. Moreover, after a bill has passed both Houses of Congress, but “before it become[s] a Law,” it must be presented to the President. If he approves it, “he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.” Art. I, Sec. 7, cl. 2. His “return” of a bill, which is usually described as a “veto,” is subject to being overridden by a two-thirds vote in each House.

There are important differences between the President’s “return” of a bill pursuant to Article I, Sec. 7, and the exercise of the President’s cancellation authority pursuant to the Line Item Veto Act. The constitutional return takes place before the bill becomes law; the statutory cancellation occurs after the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part. Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes.

There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition. The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only “be exercised in accord with a single, finely wrought and exhaustively considered, procedure.” Our first President understood the text of the Presentment Clause as requiring that he either

31As we noted earlier, they also argued that the act violated the non-delegation doctrine: The “fundamental precept . . . is that the law-making function belongs to Congress . . . and may not be conveyed to another branch.” The act violates that precept. The act allows the president the power to shape the law itself, which is a legislative power. The act also fails to provide an “intelligible principle” that would make delegation acceptable under the Court’s delegation doctrine.
“approve all the parts of a Bill, or reject it in toto.” What has emerged in these cases from the President’s exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the “finely wrought” procedure that the Framers designed. . . .

. . . [O]ur decision rests on the narrow ground that the procedures authorized by the Line Item Veto Act are not authorized by the Constitution. The Balanced Budget Act of 1997 is a 500-page document that became “Public Law 105–33” after three procedural steps were taken: (1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President. The Constitution explicitly requires that each of those three steps be taken before a bill may “become a law.” Art. I, Sec. 7. If one paragraph of that text had been omitted at any one of those three stages, Public Law 105–33 would not have been validly enacted. If the Line Item Veto Act were valid, it would authorize the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature. Something that might be known as “Public Law 105–33 as modified by the President” may or may not be desirable, but it is surely not a document that may “become a law” pursuant to the procedures designed by the Framers of Article I, Sec. 7, of the Constitution.

If there is to be a new procedure in which the President will play a different role in determining the final text of what may “become a law,” such change must come not by legislation, but through the amendment procedures set forth in Article V of the Constitution. Cf. U.S. Term Limits, Inc. v. Thornton (1995).

The judgment of the District Court is

Affirmed.

JUSTICE Breyer, with whom JUSTICE O’Connor and
JUSTICE Scalia join [in part], dissenting.

The Court believes that the Act violates the literal text of the Constitution. A simple syllogism captures its basic reasoning:

Major Premise: The Constitution sets forth an exclusive method for enacting, repealing, or amending laws.

Minor Premise: The Act authorizes the President to “repeal[] or amend[]” laws in a different way, namely by announcing a cancellation of a portion of a previously enacted law.

Conclusion: The Act is inconsistent with the Constitution.

I find this syllogism unconvincing, however, because its Minor Premise is faulty. When the President “canceled” the two appropriation measures now before us, he did not repeal any law nor did he amend any law. He simply followed the law, leaving the statutes, as they are literally written, intact . . .
I recognize that the Act before us is novel. In a sense, it skirts a constitutional edge. But that edge has to do with means, not ends. The means chosen do not amount literally to the enactment, repeal, or amendment of a law. Nor, for that matter, do they amount literally to the "line item veto" that the Act's title announces. Those means do not violate any basic Separation of Powers principle. They do not improperly shift the constitutionally foreseen balance of power from Congress to the President. Nor, since they comply with Separation of Powers principles, do they threaten the liberties of individual citizens. They represent an experiment that may, or may not, help representative government work better. The Constitution, in my view, authorizes Congress and the President to try novel methods in this way. Consequently, with respect, I dissent.

When the opinion was announced, President Clinton said, “I am deeply disappointed with today’s Supreme Court decision striking down the line-item veto. The decision is a defeat for all Americans—it deprives the President of a valuable tool for eliminating waste in the Federal budget and for enlivening the public debate over how to make the best use of public funds.” Given the views of the six-person majority, however, it is unlikely that the Court will reverse itself any time in the near future.

The Power of Appointment

For presidents to carry out the executive duties of the government effectively, they must be able to staff the various federal departments and offices with administrators who share their views and in whom they have confidence. This duty implies the power to appoint and the power to remove. The Constitution offers guidelines on the president’s appointment power, but it is silent on the removal power.

Principal versus Inferior Officers. Article II, Section 2, contains what is known as the appointments clause. It specifies the president’s authority to appoint major administrative and judicial officials, but it also allows Congress to allocate authority to other bodies for minor administrative positions:

[The president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article II, Section 2 concludes with what is known as the recess appointments clause:

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session,

Although these clauses seem detailed and specific enough, they have raised important constitutional questions. Let us consider two, one from each clause.

The first stems from a line that the appointments clause draws between major (or principal) officers and inferior offices. Principal positions, according to the appointments clause, must be filled by presidential nomination and Senate confirmation, but selections of personnel to fill inferior positions may be made by some other means as determined by Congress.32 The question becomes how to distinguish between the two.

This is an important question because from time to time Congress establishes government positions that, for various reasons, are to be filled by an appointing authority other than the president. And on occasion, someone objects to the procedure on the ground that the position is too important for anyone other than the president to fill. Courts then must determine whether the official holds a principal position as an officer of the

32We focus on the distinction between principal and inferior officers. A separate line of cases has considered the difference between officers (whether principal or inferior) and “mere employees”—that is, employees who are not subject to the Appointments Clause. In several cases, the Court established that to qualify as an officer, rather than an employee, an individual (1) “must occupy a ‘continuing’ position established by law; and (2) must ‘exercise[] significant authority pursuant to the laws of the United States.”’ See, for example, Freytag v. Commissioner (1991) and, more recently, Lucia v. Securities and Exchange Commission (2018).
United States or is an inferior official. If it is the former, then the president must make the appointment with the advice and consent of the Senate; if the latter, the power may be vested in the “President alone, in the Courts of Law, or in the Heads of Departments.”

In Morrison v. Olson (1988), involving the creation of the Office of Independent Counsel, the Court attempted to delineate the difference between “inferior” and “principal” officers. Given the kinds of cases independent counsels are appointed to investigate, are you convinced by the Court’s analysis that this official is an “inferior officer” under the meaning of the appointments clause? Or is the Court taking a pragmatic approach, recognizing that it could cause problems for the president to appoint an official prosecuting crime and corruption in his branch?

Note too that the question of whether the independent counsel is a principal officer or an inferior officer is not the only one that Morrison addressed. The Court also considered the rather unique system of appointing the independent counsel—one that involved federal judges. The appointments clause allows others to appoint inferior officers, including to “the Courts of Law.” But, even assuming the independent counsel is an inferior officer, does the clause allow judges to appoint members of another branch, such as the executive branch? In more general terms, does the appointments clause permit interbranch appointments?

Writing for the majority, Chief Justice Rehnquist held not only that the independent counsel is an inferior officer but also that the interbranch appointment procedure is constitutional. These conclusions put him at odds with his fellow conservative, Justice Scalia. In dissent, Scalia accused the majority of violating both the letter and the spirit of the separation of powers doctrine by depriving the president of all the executive powers vested in the office by the Constitution. This argument follows from a theory called the unitary executive, which claims to find

33See also Buckley v. Valeo (1976) for other questions relating to the appointment power. In this case, the justices heard a challenge to the constitutionality of the 1974 amendments to the Federal Election Campaign Act, which created the Federal Election Commission (FEC). The FEC was to enforce the law, conduct civil litigation, issue advisory opinions, and maintain records, among other responsibilities. Because of the Watergate scandal, Congress did not want the president alone to appoint the commission’s eight members. Instead, the secretary of the Senate and the clerk of the House were ex officio members without the right to vote, and the president pro tempore of the Senate, the Speaker of the House, and the president each appointed two members, one Democrat and one Republican. Both houses of Congress had to confirm the six voting members.

This arrangement was challenged as a violation of the appointments clause: these officials had to be appointed either by the president with the advice and consent of the Senate or by “the President alone,” the “Courts of Law,” or the “Heads of Departments.” Because four of the six commissioners were to be appointed by Congress—without any voice in their selection by the president, the courts, or any department head—challengers contended that the procedures violated the appointments clause. The Supreme Court partially agreed. With regard to the FEC’s investigative powers, the Court had no problem with the arrangement because investigative powers fall “in the same general category as those powers Congress might delegate to one of its own committees.” But, in terms of the FEC’s enforcement and other discretionary powers, the Court agreed with the challengers and invalidated the appointment procedures on the ground that those other powers do not operate “merely in the aid of congressional authority to legislate.”

support in the vesting clause of Article II: “The executive power shall be vested in a President of the United States of America.” This language, according to proponents, implies that only the president is vested with the authority to carry out the laws in the executive branch, so only the president can appoint and remove officers exercising executive powers, including the special prosecutor.

Morrison v. Olson
Vote: 7 (Blackmun, Brennan, Marshall, O'Conner, Rehnquist, Stevens, White)
1 (Scalia)
OPINION OF THE COURT: Rehnquist
DISSENTING OPINION: Scalia
NOT PARTICIPATING: Kennedy

FACTS:
During the Watergate scandal of the 1970s, existing laws allowed the attorney general to appoint a special prosecutor (today called a special counsel) to investigate alleged wrongdoing in the executive branch. Because of the problems encountered by the special prosecutor (detailed later in this chapter, in Nixon v. United States), Congress included a provision in the Ethics in Government Act of 1978 establishing the Office of Independent Counsel to investigate and, when necessary, to prosecute high-ranking officials of the government for violations of federal criminal laws. In other words, the independent counsel had much the same function as the special prosecutor of the 1970s but the method of selection was to be much different. Rather than leave the appointment in the executive branch (with the attorney general), the independent counsel was to be chosen by a group of three federal judges, who would be appointed by the chief justice for two years and be known as the special division. The selection of independent counsels and the description of each counsel’s jurisdiction would be the special division’s only functions. It would carry out these responsibilities only after a preliminary investigation by the attorney general indicated that an independent counsel was necessary.

Once appointed, the independent counsel could exercise all the powers of the Justice Department. A counsel appointed under the act could be removed by the attorney general, but only for cause or disabilities that would substantially impair the counsel from completing the required duties. The federal district court could review such dismissals. The independent counsel’s tenure otherwise would end when he or she declared the work to be completed or the special division concluded that the independent counsel’s assigned tasks were accomplished.

In 1982 two House subcommittees investigated the activities of the Environmental Protection Agency and the Land and Natural Resources Division of the Justice Department. During that investigation the subcommittees asked the agencies to produce certain documents. A controversy flared up over whether the legislature could demand these documents from the executive branch, a dispute that was settled after contempt of Congress citations were made and lawsuits were filed. The following year the House Judiciary Committee began an investigation into the role of Justice Department officials in these events. Two years later, in 1985, the committee issued its report, which indicated that Assistant Attorney General Theodore B. Olson had provided false and misleading statements when he testified before the committee. Two other Justice Department officials were implicated in obstructing the committee’s investigation. The committee requested that the attorney general initiate action for the appointment of an independent counsel to pursue these cases.

The special division appointed James McKay as independent counsel, but he resigned a month later. The judges then selected Alexia Morrison. Olson and the other targets of the investigation refused to cooperate with orders to produce evidence on the ground that the independent counsel provision of the Ethics in Government Act violated, among other clauses, the Constitution’s appointments clause. As the arguments below indicate, they claimed that the independent counsel was not an “inferior officer” and therefore had to be appointed by the president, not by a group of three judges. The federal district court upheld the act, but the court of appeals reversed.

ARGUMENTS:
For the appellant, Alexia Morrison, independent counsel:
• Special prosecutors should be categorized as inferior officers because they are ranked lower than judges and department heads, are paid less than the attorney general, and are given duties for a single task and for a limited time.
The term *inferior officer* in the appointments clause should be understood not in a hierarchical sense, but in a functional sense. It is irrelevant that the special prosecutor is not subordinate to another officer.

The appointments clause does not prohibit cross-branch appointments; in fact, the clause specifically leaves Congress with discretion regarding appointments, and the Supreme Court has previously upheld cross-branch appointments.

**For the appellees, Theodore B. Olson et al.:**

The act that created the Office of Independent Counsel violates the appointments clause of Article II because independent counsel are not inferior officers, who are “subordinates of heads of the departments.” Because not even the president can control special prosecutors, they are principal officers who must be appointed by the president.

The framers vested executive power in the president because they envisioned a unitary executive as the best safeguard against tyranny. The act violates Article II’s guarantee that the executive power is vested in one president required to take care that the laws are faithfully executed.

This case presents us with a challenge to the independent counsel provisions of the Ethics in Government Act of 1978. We hold today that these provisions of the Act do not violate the Appointments Clause of the Constitution, or the limitations of Article III, nor do they impermissibly interfere with the President’s authority under Article II in violation of the constitutional principle of separation of powers. . . .

The initial question is, accordingly, whether appellant is an “inferior” or a “principal” officer. If she is the latter, as the Court of Appeals concluded, then the Act is in violation of the Appointments Clause.

The line between “inferior” and “principal” officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn. . . . We need not attempt here to decide exactly where the line falls between the two types of officers, because in our view appellant clearly falls on the “inferior officer” side of that line. Several factors lead to this conclusion.

First, appellant is subject to removal by a higher Executive Branch official. Although appellant may not be “subordinate” to the Attorney General (and the President) insofar as she possesses a degree of independent discretion to exercise the powers delegated to her under the Act, the fact that she can be removed by the Attorney General indicates that she is to some degree “inferior” in rank and authority. Second, appellant is empowered by the Act to perform only certain, limited duties. An independent counsel’s role is restricted primarily to investigation and, if appropriate, prosecution for certain federal crimes. Admittedly, the Act delegates to appellant “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice,” but this grant of authority does not include any authority to formulate policy for the Government or the Executive Branch, nor does it give appellant any administrative duties outside of those necessary to operate her office. The Act specifically provides that in policy matters appellant is to comply to the extent possible with the policies of the Department.

Third, appellant’s office is limited in jurisdiction. Not only is the Act itself restricted in applicability to certain federal officials suspected of certain serious federal crimes, but an independent counsel can only act within the scope of the jurisdiction that has been granted by the Special Division pursuant to a request by the Attorney General. Finally, appellant’s office is limited in tenure. There is concededly no time limit on the appointment of a particular counsel. Nonetheless, the office of independent counsel is “temporary” in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated, either by the counsel herself or by action of the Special Division. Unlike other prosecutors, appellant has no ongoing responsibilities that extend beyond the accomplishment of the mission that was appointed for and authorized by the Special Division to undertake. In our view, these factors relating to the “ideas of tenure, duration . . . and duties” of the independent counsel are sufficient to establish that appellant is an “inferior” officer in the constitutional sense. . . .

This does not, however, end our inquiry under the Appointments Clause. Appellees argue that even if appellant is an “inferior” officer, the Clause does not empower Congress to place the power to appoint such an officer outside the Executive Branch. They contend that the Clause does not contemplate congressional authorization of “interbranch appointments,” in which an officer of one
branch is appointed by officers of another branch. The relevant language of the Appointments Clause is worth repeating. It reads: "... but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the courts of Law, or in the Heads of Departments." On its face, the language of this "excepting clause" admits of no limitation on interbranch appointments. Indeed, the inclusion of "as they think proper" seems clearly to give Congress significant discretion to determine whether it is "proper" to vest the appointment of, for example, executive officials in the "courts of Law." . . .

We also note that the history of the clause provides no support for appellees' position. Throughout most of the process of drafting the [appointments clause], the Convention concentrated on the problem of who should have the authority to appoint judges . . . [T]here was little or no debate on the question of whether the Clause empowers Congress to provide for interbranch appointments, and there is nothing to suggest that the Framers intended to prevent Congress from having that power.

We do not mean to say that Congress' power to provide for interbranch appointments of "inferior officers" is unlimited. In addition to separation of powers concerns, which would arise if such provisions for appointment had the potential to impair the constitutional functions assigned to one of the branches, . . . congress' decision to vest the appointment power in the courts would be improper if there was some "incongruity" between the functions normally performed by the courts and the performance of their duty to appoint. In this case, however, we do not think it impermissible for Congress to vest the power to appoint independent counselors in a specially created federal court. We thus disagree with the Court of Appeals' conclusion that there is an inherent incongruity about a court having the power to appoint prosecutorial officers. . . . Congress of course was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officials. If it were to remove the appointing authority from the Executive Branch, the most logical place to put it was in the Judicial Branch. In the light of the Act's provision making the judges of the Special Division ineligible to participate in any matters relating to an independent counsel they have appointed, . . . we do not think that appointment of the independent counsels by the court runs afoul of the constitutional limitation on "incongruous" interbranch appointments.

Appellees next contend that the powers vested in the Special Division by the Act conflict with Article III of the Constitution. We have long recognized that by the express provision of Article III, the judicial power of the United States is limited to "Cases" and "Controversies." As a general rule, we have broadly stated that "executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution." The purpose of this limitation is to help ensure the independence of the Judicial Branch and to prevent the judiciary from encroaching into areas reserved for the other branches. . . .

[But] once it is accepted that the Appointments Clause gives Congress the power to vest the appointment of officials such as the independent counsel in the "courts of Law," there can be no Article III objection to the Special Division's exercise of that power, as the power itself derives from the Appointments Clause, a source of authority for judicial action that is independent of Article III. . . .

We now turn to consider whether the Act is invalid under the constitutional principle of separation of powers. Two related issues must be addressed: the first is whether the provision of the Act restricting the Attorney General's power to remove the independent counsel to only those instances in which he can show "good cause," taken by itself, impermissibly interferes with the President's exercise of his constitutionally appointed functions. The second is whether, taken as a whole, the Act violates the separation of powers by reducing the President's ability to control the prosecutorial powers wielded by the independent counsel. . . .

We cannot say that the imposition of a "good cause" standard for removal by itself unduly trammels on executive authority. There is no real dispute that the functions performed by the independent counsel are "executive" in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch. As we noted above, however, the independent counsel is an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority . . . [W]e simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.

[Moreover,] this is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the
President to ensure the “faithful execution” of the laws. Rather, because the independent counsel may be terminated for “good cause,” the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act.

The final question to be addressed is whether the Act, taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive Branch.

We observe that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch. Indeed, with the exception of the power of impeachment—which applies to all officers of the United States—Congress retained for itself no powers of control or supervision over an independent counsel.

We do not think that the Act “impermissibly undermine[s]” the powers of the Executive Branch, or disrupts the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions. It is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity. Nonetheless, the Act does give the Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel. Most importantly, the Attorney General retains the power to remove the counsel for “good cause,” a power that we have already concluded provides the Executive with substantial ability to ensure that the laws are “faithfully executed” by an independent counsel.

In sum, we conclude today that it does not violate the Appointments Clause for Congress to vest the appointment of independent counsel in the Special Division; that the powers exercised by the Special Division under the Act do not violate Article III; and that the Act does not violate the separation of powers principle by impermissibly interfering with the functions of the Executive Branch. The decision of the Court of Appeals is therefore

Reversed.

JUSTICE SCALIA, dissenting.

Article II, §1, cl. 1, of the Constitution provides:

“The executive Power shall be vested in a President of the United States.” . . . [T]his does not mean some of the executive power, but all of the executive power. It seems to me, therefore, that the decision of the Court of Appeals invalidating the present statute must be upheld on fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power? Surprising to say, the Court appears to concede an affirmative answer to both questions, but seeks to avoid the inevitable conclusion that since the statute vests some purely executive power in a person who is not the President of the United States it is void.

The Court concedes that “[t]here is no real dispute that the functions performed by the independent counsel are ‘executive,’ . . . . She is vested with the ‘full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [and] the Attorney General.’ Governmental investigation and prosecution of crimes is a quintessentially executive function. See United States v. Nixon (1974).

As for the second question, whether the statute before us deprives the President of exclusive control over that quintessentially executive activity: the Court does not, and could not possibly, assert that it does not. That is indeed the whole object of the statute. Instead, the Court points out that the President, through his Attorney General, has at least some control. That concession is alone enough to invalidate the statute, but I cannot refrain from pointing out that the Court greatly exaggerates the extent of that “some” Presidential control. “Most important[ly]” among these controls, the Court asserts, is the Attorney General’s “power to remove the counsel for ‘good cause.’” This is somewhat like referring to shackles as an effective means of locomotion.

. . . It effects a revolution in our constitutional jurisprudence for the Court, once it has determined that (1) purely executive functions are at issue here, and (2) those functions have been given to a person whose actions are not fully within the supervision and control of the President, nonetheless to proceed further to sit in judgment of whether “the President’s need to control the exercise of [the independent counsel’s] discretion is so central to the functioning of the Executive Branch” as to require complete control . . . and whether “the Act give[s] the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his
constitutively assigned duties.” It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they all are. . . .

Is it unthinkable that the President should have such exclusive power, even when alleged crimes by him or his close associates are at issue? No more so than that Congress should have the exclusive power of legislation, even when what is at issue is its own exemption from the burdens of certain laws. See Civil Rights Act of 1964, Title VII . . . (prohibiting “employers,” not defined to include the United States, from discriminating on the basis of race, color, religion, sex, or national origin). No more so than that this Court should have the exclusive power to pronounce the final decision on justiciable cases and controversies, even those pertaining to the constitutionality of a statute reducing the salaries of the Justices. See United States v. Will (1980). A system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused. . . . While the separation of powers may prevent us from acting right every wrong, it does so in order to ensure that we do not lose liberty. The checks against any branch’s abuse of its exclusive powers are two-fold: First, retaliation by one of the other branch’s use of its exclusive powers; Congress, for example, can impeach the executive who willfully fails to enforce the laws; the executive can decline to prosecute under unconstitutional statutes; and the courts can dismiss malicious prosecutions. Second, and ultimately, there is the political check that the people will replace those in the political branches who are guilty of abuse. Political pressures produced special prosecutors—for Teapot Dome and for Watergate, for example—long before this statute created the independent counsel.

. . . What are the standards to determine how the balance is to be struck; that is, how much removal of Presidential power is too much? . . . Once we depart from the text of the Constitution, just where short of that do we stop? The most amazing feature of the Court’s opinion is that it does not even purport to give an answer. It simply announces, with no analysis, that the ability to control the decision whether to investigate and prosecute the President’s closest advisers, and indeed the President himself, is not “so central to the functioning of the Executive Branch” as to be constitutionally required to be within the President’s control. Apparently that is so because we say it is so. Having abandoned as the basis for our decisionmaking the text of Article II that “the executive Power” must be vested in the President, the Court does not even attempt to craft a substitute criterion—. . . however remote from the Constitution—that today governs, and in the future will govern, the decision of such questions. Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis. This is not only not the government of laws that the Constitution established; it is not a government of laws at all. . . .

The independent counsel statute upheld in Morrison v. Olson expired at the end of 1992. It was not reenacted because of partisan differences over an investigation into the Iran–Contra affair, a controversy involving members of the Reagan administration who allegedly offered to trade arms for the return of Americans held hostage in Lebanon. The independent counsel, Lawrence E. Walsh, aggressively pursued the case, but he was regarded by Republicans as excessively partisan. In addition, investigations such as that headed by Walsh had no effective spending limitations and had become unrealistically expensive. President George H. W. Bush, a Republican, threatened to veto reauthorization legislation.

In June 1994, however, a new independent counsel statute became law. The act received bipartisan support in Congress and was endorsed by President Clinton, the first chief executive to back independent counsel legislation. The new law imposed procedures modeled on the earlier statute: following the Justice Department’s preliminary investigation into alleged wrongdoing by top administration officials, the attorney general was to petition a special three-judge federal court to appoint an independent counsel to pursue the matter. The law was invoked almost immediately to appoint Kenneth Starr to continue the investigation of Clinton’s involvement in the Whitewater real estate business, which eventually led to his impeachment by the House in 1998.

The revised law received even more criticism than the earlier version. The independent counsel’s open-ended term of office, barely constrained use of prosecutorial power, and expensive operation doomed the prospects for renewing the statute yet again without significant reform. And the legislation expired without reauthorization in 1999.

But neither Olson, the appellee in the case, nor independent counsel disappeared from the scene. Olson went on to serve as solicitor general of the United States from June 2001 to July 2004 (see Box 4-2). As for independent
counsel, they continue in the form of “special counsel” (the pre-1978 version of special prosecutors). Although they are now appointed by the attorney general (or by the acting attorney general if the attorney general is recused)—and not by a special division of judges—their function is the same: to take charge of criminal investigations in which the Department of Justice may have a “conflict of interest” or in other “extraordinary circumstances” where it “would be in the public interest to appoint an outside Special Counsel.”34 As for the removal circumstances where it “would be in the public interest to remove a Special Counsel:” see 28 CFR 600.1.

You will soon have an opportunity to evaluate the legal issues surrounding the Watergate scandal. For now keep in mind that Morrison remains an important standard for determining whether an officer is an inferior officer. But it is not the only one. Less than a decade after Morrison, Justice Scalia attempted to devise a new approach in his majority opinion in Edmond v. United States (1997). After contending that “Morrison did not purport to set forth a definitive test for whether an office is ‘inferior’ under the Appointments Clause,” he wrote,

Generally speaking, the term “inferior officer” connotes a relationship with some higher ranking officer or officers below the President: whether one is an “inferior” officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase “lesser officer.” Rather, in the context of a clause designed to preserve political accountability relative to important government assignments, we think it evident that “inferior officers” are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.

Even though Scalia’s approach is more general than Rehnquist’s, Edmond did not overrule Morrison and so today both approaches coexist. Had he applied his Edmond definition of “inferior” to the special prosecutor, do you think Scalia would have reached a different conclusion in Morrison? Why or why not?

Recess Appointments. In addition to outlining appointment procedures, Article II, Section 2, allows the president “to fill up all Vacancies that may happen during the Recess of the Senate,” with the proviso that these appointments expire at the end of the next session. Why would the framers allow presidents to make these temporary “recess appointments”? Alexander Hamilton suggested a reason in Federalist No. 67:

[As it would have been improper to oblige the Senate to be continually in session for the appointment of officers, and as vacancies might happen in their recess, which it might be necessary for the public service to fill without delay, the . . . clause is evidently intended to authorize the President, singly, to make temporary appointments.

Keeping the government running at full capacity was of particular concern during the nineteenth century. Back then, the Senate’s sessions were short and its recesses long. In some years, it was in session for less than half the year.35 In contemporary times sessions are longer and recesses shorter but presidents nonetheless continue to use their recess power. President Clinton made 139 recess appointments; Bush, 171; and Obama, 32.36 Some were intersession appointments, meaning

34See 28 CFR 600.1 - Grounds for appointing a Special Counsel.
36Ibid; to date, Trump has not made a recess appointment.
they came during the recess between the two formal one-year sessions that each House of Congress holds. Others came during intrasessions. (Intrasession breaks occur in the midst of a session when the Senate or the House announces an “intrasession recess” by adopting a resolution stating that it will “adjourn” to a fixed date. That date could be a few days, weeks, or months away.) Moreover, it is worth noting, recess appointees have not just been executive officials but also judges—including fifteen justices of the Supreme Court (the last was Potter Stewart in 1958) and nearly thirty appellate court judges (the last was George W. Bush’s recess of William Pryor in 2004).17

Why do modern-day presidents make intra- or intrasession recess appointments? Many would say that they, like Hamilton, are concerned about maintaining the administration of government. But another reason is more political: sidestepping the Senate. If the president thinks that the Senate might not confirm his nominee, he can use his recess power to install the nominee in a position, if only temporarily. Though he did not say so, perhaps Hamilton would have approved of this consideration. After all, he was concerned with the smooth operation of government, which would be difficult if the Senate failed to confirm candidates for important positions. Then again, Hamilton referred to the recess power as a “supplement” to the “ordinary” method of appointment, which, he wrote, is “confined to the President and Senate jointly.”

Until the case of National Labor Relations Board v. Noel Canning (2014), there was no occasion for the Court to consider this or other issues related to the recess appointments clause. But, as Justice Breyer’s opinion for the Court in Noel Canning makes clear, presidents and their advisers, along with members of Congress, did give thought to various interpretations that the wording of the clause could admit.

As you read Noel Canning, note how Justice Breyer makes use of this history, data drawn from historical sources, and practice, among other sources, to answer three questions about the recess power. Justice Scalia also makes use of history in his concurring opinion but comes to some very different conclusions. What are the differences between the two? Who makes the better case?  

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and that the phrase “vacancies that may happen during the recess” applies only to vacancies that first come into existence during a recess.

As a result, the Supreme Court addressed three questions: (1) whether “the recess” excludes intrasessions, as the lower court held, (2) whether “may happen” refers only to vacancies that arise during the recess, again as the lower court held, and (3) whether the Senate was in session or in recess during the pro forma sessions.

**ARGUMENTS:**

*For the petitioner, NLRB:*

- Intrasession recess appointments are necessary to serve the purposes of the recess appointment clause, and practice confirms this. Presidents have made thousands of intrasession appointments.
- Since the 1820s, the vast majority of presidents have made recess appointments to fill vacancies that arose before a particular recess but continued to exist during that recess.
- The Senate is in “recess” when, for 20 days, a Senate order provides for only “pro forma” sessions at which “no business” is to be conducted. The mere possibility that the Senate might suspend its “no business” order during the 20-day period did not prevent that period from constituting a recess.

*For the respondent, Noel Canning:*

- Based on the text of the Constitution, the recess appointment power is limited to “the recess” between sessions.
- There can be no serious question that the text of the recess clause was originally understood to apply to vacancies that arise during the recess. Every known analysis prior to 1822 reaches that conclusion.
- The president cannot make recess appointments when the Senate is convening pro forma sessions every three days because pro forma sessions are actual sessions.

**CHIEF JUSTICE BREYER DELIVERED THE OPINION OF THE COURT.**

Ordinarily the President must obtain “the Advice and Consent of the Senate” before appointing an “Office[r] of the United States.” . . . U. S. Const., Art. II, §2, cl. 2. But the Recess Appointments Clause creates an exception. It gives the President alone the power “to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” . . . Art. II, §2, cl. 3. We here consider three questions about the application of this Clause.

The first concerns the scope of the words “recess of the Senate.” Does that phrase refer only to an inter-session recess (i.e., a break between formal sessions of Congress), or does it also include an intra-session recess, such as a summer recess in the midst of a session? We conclude that the Clause applies to both kinds of recess.

The second question concerns the scope of the words “vacancies that may happen.” Does that phrase refer only to vacancies that first come into existence during a recess, or does it also include vacancies that arise prior to a recess but continue to exist during the recess? We conclude that the Clause applies to both kinds of vacancy.

The third question concerns calculation of the length of a “recess.” The President made the appointments here at issue on January 4, 2012. At that time the Senate was in recess pursuant to a December 17, 2011, resolution providing for a series of brief recesses punctuated by “pro forma session[s],” with “no business . . . transacted,” every Tuesday and Friday through January 20, 2012, . . . S. J., 112th Cong., 1st Sess., 923 (2011) (hereinafter 2011 S. J.). In calculating the length of a recess are we to ignore the pro forma sessions, thereby treating the series of brief recesses as a single, month-long recess? We conclude that we cannot ignore these pro forma sessions.

Our answer to the third question means that, when the appointments before us took place, the Senate was in the midst of a 3-day recess. Three days is too short a time to bring a recess within the scope of the Clause. Thus we conclude that the President lacked the power to make the recess appointments here at issue. . . .

Before turning to the specific questions presented, we shall [note that] . . . [t]here is a great deal of history to consider here. Presidents have made recess appointments since the beginning of the Republic. Their frequency suggests that the Senate and President have recognized that recess appointments can be both necessary and appropriate in certain circumstances. We have not previously interpreted the Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.

The first question concerns the scope of the phrase “the recess of the Senate.” . . . All agree that the phrase
the recess of the Senate” covers inter-session recesses. The question is whether it includes intra-session recesses as well.

In our view, the phrase “the recess” includes an intra-session recess of substantial length. Its words taken literally can refer to both types of recess. Founding-era dictionaries define the word “recess,” much as we do today, simply as “a period of cessation from usual work.” . . . The Oxford English Dictionary citing 18th- and 19th-century sources for that definition of “recess.” . . . The Founders themselves used the word to refer to intra-session, as well as to inter-session, breaks. . . .

We recognize that the word “the” in “the recess” might suggest that the phrase refers to the single break separating formal sessions of Congress. [But] in fact, the phrase “the recess” was used to refer to intra-session recesses at the time of the founding. . . .

And we believe the Clause’s purpose demands the broader interpretation. The Clause gives the President authority to make appointments during “the recess of the Senate” so that the President can ensure the continued functioning of the Federal Government when the Senate is away. The Senate is equally away during both an inter-session and an intra-session recess, and its capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure.

History also offers strong support for the broad interpretation. . . .

In all, between the founding and the Great Depression, Congress took substantial intra-session breaks (other than holiday breaks) in four years: 1867, 1868, 1921, and 1929. And in each of those years the President made intra-session recess appointments.

Since 1929, and particularly since the end of World War II, Congress has shortened its inter-session breaks as it has taken longer and more frequent intra-session breaks; Presidents have correspondingly made more intra-session recess appointments. Indeed, if we include military appointments, Presidents have made thousands of intra-session recess appointments. . . .

The upshot is that restricting the Clause to inter-session recesses would frustrate its purpose. It would make the President’s recess-appointment power dependent on a formalistic distinction of Senate procedure . . .

The greater interpretive problem is determining how long a recess must be in order to fall within the Clause. Is a break of a week, or a day, or an hour too short to count as a “recess”? . . .

[The Solicitor General] argues that the lower limit should be three days by analogy to the Adjournments Clause of the Constitution. That Clause says: “Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days.”

We agree with the Solicitor General that a 3-day recess would be too short. . . . A Senate recess that is so short that it does not require the consent of the House is not long enough to trigger the President’s recess-appointment power.

That is not to say that the President may make recess appointments during any recess that is “more than three days.” The Recess Appointments Clause seeks to permit the Executive Branch to function smoothly when Congress is unavailable. And though Congress has taken short breaks for almost 200 years, and there have been many thousands of recess appointments in that time, we have not found a single example of a recess appointment made during an intra-session recess that was shorter than 10 days. . . .

We therefore conclude, in light of historical practice, that a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause. We add the word “presumptively” to leave open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break. . . . (It should go without saying—except that Justice Scalia compels us to say it—that political opposition in the Senate would not qualify as an unusual circumstance.) . . .

The second question concerns the scope of the phrase “vacancies that may happen during the recess of the Senate.” Art. II, §2, cl. 3. All agree that the phrase applies to vacancies that initially occur during a recess. But does it also apply to vacancies that initially occur before a recess and continue to exist during the recess? In our view the phrase applies to both kinds of vacancy.

We believe that the Clause’s language, read literally, permits, though it does not naturally favor, our broader interpretation. We concede that the most natural meaning of “happens” as applied to a “vacancy” (at least to a modern ear) is that the vacancy “happens” when it initially occurs . . .

[But] the Clause’s purpose strongly supports the broader interpretation. That purpose is to permit the President to obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them. [T]he narrower interpretation would undermine this purpose. . . .
Examples are not difficult to imagine: An ambassadorial post falls vacant too soon before the recess begins for the President to appoint a replacement; the Senate rejects a President’s nominee just before a recess, too late to select another. . . .

Historical practice over the past 200 years [also] strongly favors the broader interpretation. The tradition of applying the Clause to pre-recess vacancies dates at least to President James Madison. . . .

Further, we have examined a random sample of the recess appointments made by our two most recent Presidents, and have found that almost all of those appointments filled pre-recess vacancies: Of a sample of 21 recess appointments, 18 filled pre-recess vacancies and only 1 filled a vacancy that arose during the recess in which he was appointed. The precise date on which 2 of the vacancies arose could not be determined. Taken together, we think it is a fair inference that a large proportion of the recess appointments in the history of the Nation have filled pre-existing vacancies. . . .

And we are reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long . . .

The third question concerns the calculation of the length of the Senate’s “recess.” . . .

The President made the recess appointments before us on January 4, 2012, in between the January 3 and the January 6 pro forma sessions. We must determine the significance of these sessions—that is, whether, for purposes of the Clause, we should treat them as periods when the Senate was in session or as periods when it was in recess. If the former, the period between January 3 and January 6 was a 3-day recess, which is too short to trigger the President’s recess-appointment power. If the latter, however, then the 3-day period was part of a much longer recess during which the President did have the power to make recess appointments. . . .

In our view, however, the pro forma sessions count as sessions, not as periods of recess. We hold that, for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business. The Senate met that standard here.

The standard we apply is consistent with the Constitution’s broad delegation of authority to the Senate to determine how and when to conduct its business. The Constitution explicitly empowers the Senate to “determine the Rules of its Proceedings.” Art. I, §5, cl. 2. . . .

In addition, the Constitution provides the Senate with extensive control over its schedule. . . . This suggests that the Senate’s determination about what constitutes a session should merit great respect . . .

But our deference to the Senate cannot be absolute. [I]f the Senate had left the Capitol and “effectively given up . . . the business of legislating” then it might be in recess, even if it said it was not. In that circumstance, the Senate is not simply unlikely or unwilling to act upon nominations of the President. It is unable to do so. The purpose of the Clause is to ensure the continued functioning of the Federal Government while the Senate is unavailable. This purpose would count for little were we to treat the Senate as though it were in session even when it lacks the ability to provide its “advice and consent.” Accordingly, we conclude that when the Senate declares that it is in session and possesses the capacity, under its own rules, to conduct business, it is in session for purposes of the Clause.

Applying this standard, we find that the pro forma sessions were sessions for purposes of the Clause. First, the Senate said it was in session . . .

Second, the Senate’s rules make clear that during its pro forma sessions, despite its resolution that it would conduct no business, the Senate retained the power to conduct business . . .

By way of contrast, we do not see how the Senate could conduct business during a recess. It could terminate the recess and then, when in session, pass a bill. But in that case, of course, the Senate would no longer be in recess. It would be in session. And that is the crucial point. Senate rules make clear that, once in session, the Senate can act even if it has earlier said that it would not . . .

Given our answer to the last question before us, we conclude that the Recess Appointments Clause does not give the President the constitutional authority to make the appointments here at issue. Because the Court of Appeals reached the same ultimate conclusion (though for reasons we reject), its judgment is affirmed.

It is so ordered.

JUSTICE SCALIA, concurring.

The first question presented is whether “the Recess of the Senate,” during which the President’s recess-appointment power is active, is (a) the period between two of the Senate’s formal sessions, or (b) any break in the Senate’s proceedings. I would hold that “the Recess” is the gap between sessions and that the appointments at issue here
are invalid because they undisputedly were made during the Senate's session . . .

A sensible interpretation of the Recess Appointments Clause should start by recognizing that the Clause uses the term “Recess” in contradistinction to the term “Session.” . . .

In the founding era, the terms “recess” and “session” had well-understood meanings in the marking-out of legislative time. The life of each elected Congress typically consisted (as it still does) of two or more formal sessions separated by adjournments “sine die,” that is, without a specified return date. The period between two sessions was known as “the recess.” . . .

It is linguistically implausible to suppose—as the majority does—that the Clause uses one of those terms (“Recess”) informally and the other (“Session”) formally in a single sentence, with the result that an event can occur during both the “Recess” and the “Session.” . . .

To avoid the absurd results that follow from its colloquial reading of “the Recess,” the majority is forced to declare that some intra-session breaks—though undisputedly within the phrase’s colloquial meaning—are simply “too short to trigger the Recess Appointments Clause.” But it identifies no textual basis whatsoever for limiting the length of “the Recess,” nor does it point to any clear standard for determining how short is too short. It is inconceivable that the Framers would have left the circumstances in which the President could exercise such a significant and potentially dangerous power so utterly indeterminate . . .

The second question presented is whether vacancies that “happen during the Recess of the Senate,” which the President is empowered to fill with recess appointments, are (a) vacancies that arise during the recess, or (b) all vacancies that exist during the recess, regardless of when they arose. I would hold that the recess-appointment power is limited to vacancies that arise during the recess in which they are filled . . . . As the majority concedes, “the most natural meaning of ‘happens’ as applied to a ‘vacancy’ . . . is that the vacancy ‘happens’ when it initially occurs.” The majority adds that this meaning is most natural “to a modern ear,” but it fails to show that founding-era ears heard it differently. “Happen” meant then, as it does now, “[t]o fall out; to chance; to come to pass.” 1 Johnson, Dictionary of the English Language 913.

Thus, a vacancy that happened during the Recess was most reasonably understood as one that arose during the recess. Even if the Constitution were wrongly thought to be ambiguous on this point, a fair recounting of the relevant history does not support the majority’s interpretation . . . . Washington’s and Adams’ Attorneys General read the Constitution to restrict recess appointments to vacancies arising during the recess, and there is no evidence that any of the first four Presidents consciously departed from that reading. The contrary reading was first defended by an executive official in 1823, was vehemently rejected by the Senate in 1863, was vigorously resisted by legislation in place from 1863 until 1940. . . . I can conceive of no sane constitutional theory under which this evidence of “historical practice”—which is actually evidence of a long-simmering inter-branch conflict—would require us to defer to the views of the Executive Branch . . .

What the majority needs to sustain its judgment is an ambiguous text and a clear historical practice. What it has is a clear text and an at-best-ambiguous historical practice. Even if the Executive could accumulate power through adverse possession by engaging in a consistent and unchallenged practice over a long period of time, the oft-disputed practices at issue here would not meet that standard. Nor have those practices created any justifiable expectations that could be disappointed by enforcing the Constitution’s original meaning. There is thus no ground for the majority’s deference to the unconstitutional recess-appointment practices of the Executive Branch . . . .

I concur in the judgment only.

After the Court issued its decision in Noel Canning, one journalist claimed that it was a “unanimous rebuke to President Obama.” 38 Many commentators have gone further, claiming that Noel Canning was actually a major loss for presidential power, and not just for the Obama administration. One lawyer put it this way:

In the past, if a president was unable to get a nominee confirmed, he would sometimes sidestep an uncooperative Senate by making a recess appointment, rather than finding another nominee who had better chances of being confirmed. Going forward, that will rarely (if ever) be an option. 39

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Scalia disagreed. In fact, he was so outraged by the majority’s opinion that he took the very rare step of summarizing his concurrence from the bench. According to Scalia, “The majority practically bends over backwards to ensure that recess appointments will remain a powerful weapon in the president’s arsenal.” Who has the better case: the commentators or Scalia? In thinking about this question, you may want to consider that through the middle of 2018, Trump had not made a recess appointment in part because the Senate has used a series of brief pro forma sessions to block him from so doing—a perfectly permissible strategy under Noel Canning.

The Power of Removal

The president’s need to have executive branch officials who support the administration’s policy goals is only partially satisfied by the power to appoint. What presidents also say they require is the corollary—the discretionary right to remove administrative officials from office. This need may arise when a president’s appointees do not carry out their duties the way the president wishes, or when an official appointed by a previous administration will not voluntarily step aside to make way for a nominee of the new president’s choosing.

Article II, Section 4, of the Constitution specifies that “[t]he President, Vice President and all civil Officers of the United States, shall be removed from office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” Short of impeachment, however, the Constitution does not delineate procedures for removals. In the absence of constitutional guidelines, a lingering controversy has centered on whether administrative officials can be removed at the discretion of the president alone or whether Congress also must play a role.

The argument supporting presidential discretion holds that the chief executive must be free to remove those subordinates who fail to meet the president’s expectations or who are not loyal to the administration’s policy objectives. It would be unreasonable to require the approval of Congress before such officials could be dismissed. Such a requirement might well paralyze the executive branch, particularly when the legislature and the presidency are under the control of different political parties. Moreover, recall that in the view of proponents of the unitary executive doctrine, only the president is vested with the authority to execute the laws in the executive branch and only he can remove officers in “his” branch.

The argument for legislative participation in the process holds that the Constitution anticipates Senate action. If the president can appoint major executive department officials only with senatorial approval, it is reasonable to infer that the chief executive can remove administrators only by going through the same process and obtaining the advice and consent of the Senate. In The Federalist Papers’ only reference to the removal powers, in Federalist No. 77, Alexander Hamilton supported this view, stating flatly, “The consent of that body [the Senate] would be necessary to displace as well as to appoint.” Hamilton argued that if the president and the Senate agreed that an official should be removed, the decision would be much better accepted than if the president acted alone. Hamilton also asserted that a new president should be restrained from removing an experienced official who had conducted his duties satisfactorily just because the president preferred to have a different person in the position.

Historical practice generally has rejected Hamilton’s position. From the very beginning, Congress allowed the chief executive to remove administrative officials without Senate consent. In the First Congress, James Madison proposed that three executive departments be created: the Foreign Affairs, Treasury, and War Departments. The creation of the Foreign Affairs (later State) Department received the most legislative attention. According to Madison’s recommendation, the department was to have a secretary to be appointed by the president with the approval of the Senate who could be removed by the president alone. The House and the Senate held long, comprehensive debates on the removal power at that time and passed legislation allowing the secretary of state to be removed at the president’s discretion without Senate approval.

At times, however, the legislature has asserted a right to participate in the removal process. The most notable example occurred with the passage of the Tenure of Office Act in 1867. This statute was enacted to restrict the powers of President Andrew Johnson, who took office after Lincoln’s assassination in 1865. Following the Civil War, the Radical Republicans dominated Congress and had little use for Johnson, a Democrat from Tennessee. Congress did not want Johnson to be able to remove Lincoln’s appointees. The Tenure of Office Act stipulated that the president could not remove high-ranking executive department heads without first obtaining the approval of the Senate. Johnson blatantly defied the statute by dismissing Secretary of War Edwin M. Stanton in August 1867 and appointing Ulysses S. Grant as interim secretary. The Senate ordered Stanton reinstated. Grant
FACTS:

Prior to its replacement by the United States Postal Service in 1970, the U.S. Post Office Department was a cabinet-level department but considered something of a patronage agency. Postal officials, beginning with the postmaster general (the head of the department) and continuing down to the local postmasters, were political appointees rewarded for loyal party service. In July 1917 President Woodrow Wilson, with the advice and consent of the Senate, appointed Frank S. Myers to be a first-class postmaster in Portland, Oregon, for a four-year term.

Toward the end of Wilson's administration, Postmaster General Albert Burleson obtained information that led him to believe that Myers had committed fraud in the course of his official duties. After considering the case, Wilson reached the same conclusion and decided Myers should be removed from office. In January 1920 Burleson, on the president's orders, asked Myers to submit his resignation. When Myers ignored tradition and refused Wilson's request, the president ordered the postmaster general to fire him, which he did in February. Myers complained that his removal was illegal. The basis for his argument was an 1876 federal law that said, "Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law."

Wilson strongly believed that his right to remove individuals from appointed office was not to be shared with Congress, and he had engaged in some bitter fights with Congress over this point.

Because Wilson had not received the Senate's approval for the dismissal, Myers claimed he had been unlawfully fired. He sued for his unpaid salary from the date of his removal to the expiration of his four-year term, a claim of $8,838.71. During the period at issue, Myers accepted no other employment, and the Senate confirmed no other nominee for the position. After Myers died, his widow continued the legal action. The
court of claims rejected Myers’s suit, and an appeal came to the Supreme Court. After a detailed discussion of the events surrounding Madison’s proposals during the First Congress (the decision of 1789) and the controversy over the Tenure of Office Act, Chief Justice Taft explained the Court’s decision in favor of presidential discretion in exercising the removal power.

**ARGUMENTS:**

*For the appellant, Lois P. Myers for the estate of Frank S. Myers:*

- Article II, Section 2, gives Congress discretion to vest the appointment of inferior officers in the president, courts, or heads of departments, and should be inferred to allow congressional participation in the removal of those same officers.
- The 1876 law is neither isolated nor eccentric; many congressional acts operate under the similar assumption that Congress has the power to prescribe the terms of removal from office of presidential appointees.
- The argument that the president cannot effectively execute the laws without the unrestricted power of removal begs the question. Congress makes the laws that the president must execute. The Constitution makes no vague grant of an executive prerogative to disregard legislative enactments.

*For the appellee, United States:*

- The president has full and complete power of removal under Article II, which vests the executive power in the president. Because the power to remove an officer of the executive branch is an executive duty, the president has full power of removal.
- If Congress has the power to prohibit the president from removing any executive official without its consent, the presidential office becomes dependent on Congress, thereby impairing the system of checks and balances. If Congress can prohibit the president from removing a postmaster without its consent, then what is to stop Congress from prohibiting the president from removing a member of his cabinet without its consent?
- Suppose one political party dominated Congress and Congress made all incumbent cabinet members irremovable except with the consent of the Senate.

If a president of a different party were elected, his power to do his job would be greatly impaired if not altogether destroyed. This would be the destruction of the presidential office as an independent branch of government.

**MR. CHIEF JUSTICE TAFT DELIVERED THE OPINION OF THE COURT:**

This case presents the question whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate. . . .

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this court. As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible. It was urged that the natural meaning of the term “executive power” granted the President included the appointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood. . . .

. . . A veto by the Senate—a part of the legislative branch of the Government—upon removals is a much greater limitation upon the executive branch and a much more serious blending of the legislative with the executive than a rejection of a proposed appointment. It is not to be implied. The rejection of a nominee of the President for a particular office does not greatly embarrass him in the conscientious discharge of his high duties in the selection of those who are to aid him, because the President usually has an ample field from which to select for office, according to his preference, competent and capable men. The Senate has full power to reject newly proposed appointees whenever the President shall remove the incumbents. Such
a check enables the Senate to prevent the filling of offices
with bad or incompetent men or with those against whom
there is tenable objection.

The power to prevent the removal of an officer who
has served under the President is different from the
authority to consent to or reject his appointment. When a
nomination is made, it may be presumed that the Senate
is, or may become, as well advised as to the fitness of the
nominee as the President, but in the nature of things the
defects in ability or intelligence or loyalty in the adminis-
tration of the laws of one who has served as an officer
under the President, are facts as to which the President,
or his trusted subordinates, must be better informed than
the Senate, and the power to remove him may, therefore,
be regarded as confined, for very sound and practical rea-
sons, to the governmental authority which has administra-
tive control. The power of removal is incident to the power
of appointment, not to the power of advising and consent-
ing to appointment; and when the grant of the executive
power is enforced by the express mandate to take care that
the laws be faithfully executed, it emphasizes the necessity
for including within the executive power as conferred the
exclusive power of removal.

Made responsible under the Constitution for the effec-
tive enforcement of the law, the President needs an
indispensable aid to meet it the disciplinary influence upon
those who act under him of a reserve power of removal.
But it is contended that executive officers appointed by the
President with the consent of the Senate are not his
servants to do his will, and that his obligation to care for
the faithful execution of the laws does not authorize him
to treat them as such. The degree of guidance in the dis-
charge of their duties that the President may exercise over
executive officers varies with the character of their service
as prescribed in the law under which they act. The highest
and most important duties which his subordinates perform
are those in which they act for him. In such cases they are
exercising not their own but his discretion. This field is a
very large one. It is sometimes described as political. Each
head of a department is and must be the President’s alter
ego in the matters of that department where the President
is required by law to exercise authority.

In all such cases, the discretion to be exercised is that
of the President in determining the national public interest
and in directing the action to be taken by his executive sub-
ordinates to protect it. In this field his cabinet officers must
do his will. He must place in each member of his official
family, and his chief executive subordinates, implicit faith.
The moment that he loses confidence in the intelligence,
ability, judgment or loyalty of any one of them, he must have
the power to remove him without delay. To require him to
file charges and submit them to the consideration of the
Senate might make impossible that unity and coordination
in executive administration essential to effective action.

The duties of the heads of departments and bureaus
in which the discretion of the President is exercised...are
the most important in the whole field of executive action of
the Government. There is nothing in the Constitution which
permits a distinction between the removal of the head of
department or a bureau, when he discharges a political
duty of the President or exercises his discretion, and the
removal of executive officers engaged in the discharge of
their other normal duties. The imperative reasons requiring
an unrestricted power to remove the most important of his
subordinates in their most important duties must, there-
fore, control the interpretation of the Constitution as to all
appointed by him.

But this is not to say that there are not strong reasons
why the President should have a like power to remove his
appointees charged with other duties than those above
described. The ordinary duties of officers prescribed by
statute come under the general administrative control of
the President by virtue of the general grant to him of the
executive power, and he may properly supervise and guide
their construction of the statutes under which they act in
order to secure that unitary and uniform execution of the
laws which Article II of the Constitution evidently contempt-
ulated in vesting general executive power in the President
alone. Laws are often passed with specific provision for the
adoption of regulations by a department or bureau head to
make the law workable and effective. The ability and judg-
ment manifested by the official thus empowered, as well
as his energy and stimulation of his subordinates, are sub-
jects which the President must consider and supervise in
his administrative control. Finding such officers to be neg-
ligent and inefficient, the President should have the power
to remove them. Of course there may be duties so pecu-
liarly and specifically committed to the discretion of a par-
ticular officer as to raise a question whether the President
may overrule or revise the officer’s interpretation of his
statutory duty in a particular instance. Then there may be
duties of a quasi-judicial character imposed on executive
officers and members of executive tribunals whose deci-
sions after hearing affect interests of individuals, the dis-
charge of which the President can not in a particular case
properly influence or control. But even in such a case he

CHAPTER FOUR • THE EXECUTIVE
may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed. . . .

We come now to consider an argument advanced and strongly pressed on behalf of the complainant, that this case concerns only the removal of a postmaster; that a postmaster is an inferior officer; that such an office was not included within the legislative decision of 1789, which related only to superior officers to be appointed by the President by and with the advice and consent of the Senate. . . .

The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power. The authority of Congress given by the excepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove. It has been the practice of Congress to do so and this Court has recognized that power. . . . But the Court never has held, nor reasonably could hold, although it is argued to the contrary on behalf of the appellant, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers.

Assuming then the power of Congress to regulate removals as incidental to the exercise of its constitutional power to vest appointments of inferior officers in the heads of departments, certainly so long as Congress does not exercise that power, the power of removal must remain where the Constitution places it, with the President, as part of the executive power, in accordance with the legislative decision of 1789 which we have been considering. . . .

Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President the executive power of Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that Article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate’s consent; that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication; that the President’s power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate’s power of checking appointments; and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed. . . .

When, on the merits, we find our conclusion strongly favoring the view which prevailed in the First Congress, we have no hesitation in holding that conclusion to be correct; and if therefore follows that the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so.

For the reasons given, we must therefore hold that the provision of the law of 1876, by which the unrestricted power of removal of first class postmasters is denied to the President, is in violation of the Constitution, and invalid. This leads to an affirmation of the judgment of the Court of Claims.

The separate opinion of Mr. Justice McReynolds.

Congress has long and vigorously asserted its right to restrict removals and there has been no common executive practice based upon a contrary view. The President has often removed, and it is admitted that he may remove, with either the express or implied assent of Congress; but the present theory is that he may override the declared will of the body. This goes far beyond any practice heretofore approved or followed; it conflicts with the history of the Constitution, with the ordinary rules of interpretation, and with the construction approved by Congress since the beginning and emphatically sanctioned by this court. To adopt it would be revolutionary. . . .

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The federal Constitution is an instrument of exact expression. Those who maintain that Art. 2, Sec. 1, was intended as a grant of every power of executive nature not specifically qualified or denied, must show that the term “executive power” had some definite and commonly accepted meaning in 1787 . . .

In any rational search for answer to the questions arising upon this record, it is important not to forget—

That this is a government of limited powers definitely enumerated and granted by a written Constitution. . . .

That the Constitution must be interpreted by attributing to its words the meaning which they bore at the time of its adoption and in view of commonly-accepted canons of construction, its history, early and long-continued practices under it, and relevant opinions of this court.

That the Constitution endows Congress with plenary powers “to establish post offices and post roads.”

That exercising this power during the years from 1789 to 1836, Congress provided for postmasters and vested the power to appoint and remove all of them at pleasure in the Postmaster General.

That the Constitution contains no words which specifically grant to the President power to remove duly appointed officers. And it is definitely settled that he cannot remove those whom he has not appointed—certainly they can be removed only as Congress may permit.

That postmasters are inferior officers within the meaning of Art. II, Sec. 2, of the Constitution.

That from its first session to the last one Congress has often asserted its right to restrict the President’s power to remove inferior officers, although appointed by him with consent of the Senate.

That many Presidents have approved statutes limiting the power of the executive to remove, and that from the beginning such limitations have been respected in practice. . . .

That to declare the President vested with indefinite and illimitable executive powers would extend the field of his possible action far beyond the limits observed by his predecessors and would enlarge the powers of Congress to a degree incapable of fair appraisement.

Considering all these things, it is impossible for me to accept the view that the President may dismiss, as caprice may suggest, any inferior officer whom he has appointed with consent of the Senate, notwithstanding a positive inhibition by Congress. In the last analysis that view has no substantial support . . .

Judgment should go for the appellant.

MR. JUSTICE BRANDEIS, dissenting.

The contention that Congress is powerless to make consent of the Senate a condition of removal by the President from an executive office rests mainly upon the clause in § 1 of Article II which declares that “The executive Power shall be vested in a President.” The argument is that appointment and removal of officials are executive prerogatives; that the grant to the President of “the executive Power” confers upon him, as inherent in the office, the power to exercise these two functions without restriction by Congress, except insofar as the power to restrict his exercise of them is expressly conferred upon Congress by the Constitution; that, in respect to appointment, certain restrictions of the executive power are so provided for; but that, in respect to removal, there is no express grant to Congress of any power to limit the President’s prerogative. The simple answer to the argument is this: the ability to remove a subordinate executive officer, being an essential of effective government, will, in the absence of express constitutional provision to the contrary, be deemed to have been vested in some person or body. But it is not a power inherent in the President as a chief executive. The President’s power of removal from statutory civil inferior offices, like the power of appointment to them, comes immediately from Congress. It is true that the exercise of the power of removal is said to be an executive act, and that, when the Senate grants or withholds consent to a removal by the President, it participates in an executive act. But the Constitution has confessedly granted to Congress the legislative power to create offices, and to prescribe the tenure thereof, and it has not in terms denied to Congress the power to control removals . . .

It is also argued that the clauses in Article II, § 3, of the Constitution, which declare that the President “shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States” imply a grant to the President of the alleged uncontrollable power of removal. I do not find in [this] clause anything which supports this claim. . . . There is no express grant to the President of incidental powers resembling those conferred upon Congress by [the necessary and power clause] of Article I, § 8. A power implied on the ground that it is inherent in the executive, must, according to established principles of constitutional construction, be limited to “the least possible power adequate to the end proposed.” . . . Power to remove, as well as to suspend, a high political officer might conceivably be deemed indispensable to democratic government and, hence, inherent in the President. But power to remove an inferior administrative officer
appointed for a fixed term cannot conceivably be deemed an essential of government.

To imply a grant to the President of the uncontrollable power of removal from statutory inferior executive offices involves an unnecessary and indefensible limitation upon the constitutional power of Congress to fix the tenure of inferior statutory offices. That such a limitation cannot be justified on the ground of necessity is demonstrated by the practice of our governments, state and national. In none of the original thirteen States did the chief executive possess such power at the time of the adoption of the Federal Constitution. . . .

The practice of Congress to control the exercise of the executive power of removal from inferior offices is evidenced by many statutes which restrict it in many ways besides the removal clause here in question. Each of these restrictive statutes became law with the approval of the President . . . Some of these statutes, prescribing a fixed term, provide that removal shall be made only or one of several specified causes. Some provide a fixed term, subject generally to removal for cause. Some provide for removal only after hearing. Some provide a fixed term, subject to removal for reasons to be communicated by the President to the Senate . . .

The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. In order to prevent arbitrary executive action, the Constitution provided in terms that presidential appointments be made with the consent of the Senate, unless Congress should otherwise provide, and this clause was construed by Alexander Hamilton in The Federalist, No. 77, as requiring like consent to removals.

Nine years later the president’s discretionary power to remove administrators was challenged again. This time the situation was somewhat different because the office involved had greater policy-making power than the local postmaster position at issue in Myers. Here, the fired officer was not a member of the regular executive branch departments but a member of the Federal Trade Commission (FTC), an independent regulatory board. Did these differences prompt the justices to rule differently on the president’s removal power, or did the Myers precedent apply here as well?

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**Humphrey’s Executor v. United States**

295 U.S. 602 (1935)


Vote: 9 (Brandeis, Butler, Cardozo, Hughes, McReynolds, Roberts, Stone, Sutherland, Van Devanter)

**OPINION OF THE COURT: Sutherland**

**FACTS:**

In 1914 Congress created the Federal Trade Commission (FTC) as an independent regulatory agency to enforce antitrust laws and prevent unfair methods of commercial competition. The statute called for the FTC to be staffed by five commissioners appointed by the president and confirmed by the Senate. Not more than three members could be of the same political party, and members were to serve staggered seven-year terms. These provisions were intended to increase the independence of the board and prevent its domination by the incumbent chief executive. The president could remove commissioners, but only for inefficiency, neglect of duty, or malfeasance in office. The commission had the powers of rule making, investigation, and enforcement.

In 1931 President Herbert Hoover named FTC commissioner William E. Humphrey to a second seven-year term, which would expire in 1938. When Franklin Roosevelt was elected in 1932, he made every effort to staff the executive branch with people who were committed to his New Deal programs for combating the Great Depression. The president wrote to Humphrey on July 25, 1933, asking him to resign from his post on the ground that “the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection.” When Humphrey did not reply, the president wrote to him again on August 31: “You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it best for the people of this country that I should have a full confidence.” Humphrey then told the president that he would not resign. In his third letter to Humphrey, dated October 7, Roosevelt wrote, “Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission.” The president did not rest his action on any of the statutory grounds for removing a commissioner; rather, he fired Humphrey because he did not approve of his positions on policy matters.
related to the jurisdiction of the FTC. Humphrey claimed he had been illegally removed.

Humphrey died in February 1934. His executor filed suit in the court of claims in behalf of Humphrey's estate to recover the salary lost between the date of his dismissal and his death. The administration argued on the basis of Myers that the president was free to remove executive officials at will. Humphrey’s executor claimed that the law establishing the FTC placed constitutionally valid restraints on the president’s discretion to remove officeholders. The court of claims asked the Supreme Court to answer two questions: Did the Federal Trade Commission Act restrict the president’s removal power to those grounds cited in the statute? And, if so, is such a restriction constitutional?

ARGUMENTS:

For the plaintiff, Samuel F. Rathbun, as executor of the estate of William E. Humphrey, deceased:

- The duties and functions of the Federal Trade Commission are inconsistent with an unrestricted power of removal by the president. The FTC was intended to be an independent body. The power to remove an officer is the power to dominate him. The separation of powers theory is inconsistent with the domination of such an agency by the president through the exercise of an unrestricted removal power.
- In Myers the Court ruled that the Constitution gives the president the exclusive power to remove an executive officer appointed by him with the advice and consent of the Senate. This ruling has no application to an FTC commissioner who performs functions as an agent not only of the executive but also of the legislature and the courts.

For the defendant, United States:

- Limiting the removal power is an unconstitutional interference with the executive power of the president, as Myers held. The Supreme Court should adhere to precedent.
- No sound distinction can be drawn between this case and Myers. A limitation on the grounds of removal is at least as substantial an interference with the executive power as is a requirement that the Senate participate in the removal.
- There is nothing in the nature and functions of the FTC to justify a departure from Myers. The functions the FTC performs are in no essential respects different from those performed by the heads of the departments.

MR. JUSTICE SUTHERLAND DELIVERED THE OPINION OF THE COURT.

First. The question first to be considered is whether, by the provisions of §1 of the Federal Trade Commission Act, . . . the President’s power is limited to removal for the specific causes enumerated therein, . . .

The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts “appointed by law and informed by experience.”

The legislative reports in both houses of Congress clearly reflect the view that a fixed term was necessary to the effective and fair administration of the law. In the report to the Senate the Senate Committee on Interstate Commerce, in support of the bill which afterwards became the act in question, after referring to the provision fixing the term of office at seven years, so arranged that the membership would not be subject to complete change at any one time. . . .

The debates in both houses demonstrate that the prevailing view was that the commission was not to be “subject to anybody in the government but . . . only to the people of the United States”; free from “political domination or control” or the “probability or possibility of such a thing”; to be “separate and apart from any existing department of the government—not subject to the orders of the President.”

More to the same effect appears in the debates, which were long and thorough and contain nothing to the contrary. While the general rule precludes the use of these debates to explain the meaning of the words of the statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy.

Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional
intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

We conclude that the intent of the act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here; and we pass to the second question.

Second. To support its contention that the removal provision of §1, as we have just construed it, is an unconstitutional interference with the executive power of the President, the government’s chief reliance is Myers v. United States. That case has been so recently decided, and the prevailing and dissenting opinions so fully review the general subject of the power of executive removal, that further discussion would add little to the value of the wealth of material there collected . . . Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government’s contention, but these are beyond the point involved and, therefore, do not come within the rule of stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved . . .

The office of a postmaster is so essentially unlike the office now involved that the decision in the Myers case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the Myers case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther;—much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of “unfair methods of competition”—that is to say in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially. In making investigations and reports thereon for the information of Congress . . . in aid of the legislative power, it acts as a legislative agency. Under another provision of the law, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will.

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments.
by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. . . .

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments. . . .

The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

To the extent that, between the decision in the Myers case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

In Humphrey’s Executor the Court distinguished between officials who exercise purely executive powers and those who carry out quasi-legislative and quasi-judicial functions. The former serve at the pleasure of the president and may be removed at his discretion. The latter may be removed only with procedures consistent with statutory conditions enacted by Congress. Would Chief Justice Taft have agreed with this distinction? Or did his opinion in Myers suggest that he would have opposed any constraints on the presidential power to remove officials?

No matter what Taft might have thought, the Humphrey’s Executor scheme was reaffirmed in Wiener v. United States (1958). The case involved a member of the War Claims Commission, a body that Congress established in 1948 to receive and adjudicate claims for compensating certain parties who suffered damages at the hands of the enemy in World War II. The statute created a three-member commission appointed by the president and confirmed by the Senate. The commission was scheduled to go out of existence two years after the deadline for filing claims, but, after some legislative extensions, the expiration date was changed to 1954. The statute contained no provisions for terms of office or procedures for removal.

President Truman appointed Myron Wiener to the commission in 1950. President Dwight D. Eisenhower, elected in 1952, wanted to replace the commission members with Republicans, and he requested the resignations of the incumbents. Eisenhower wrote to Wiener, “I regard it as in the national interest to complete the administration of the War Claims Act of 1948, as amended, with personnel of my own selection.” When the incumbents refused to resign, Eisenhower ordered them dismissed and appointed their replacements. The Eisenhower appointees served in office as recess appointments. The Senate had not yet confirmed them when the commission ceased to exist. Wiener sued for the salary denied him from the date of his removal to the expiration of the commission. The court of claims ruled in favor of the government, and Wiener appealed to the Supreme Court.

Justice Felix Frankfurter, writing for a unanimous bench, reversed. The justices concluded that Wiener had been fired illegally. The war claims commissioners exercised quasi-judicial functions, and therefore the position was governed by the decision in Humphrey’s Executor rather than Myers. Because Wiener did not exercise purely executive powers, Eisenhower had no power under the Constitution or the statute creating the commission to remove him. The Wiener decision is important because, by reaffirming Humphrey’s Executor, it brought an authoritative close to questions regarding the extent of the president’s power to remove officeholders at his discretion alone.

**Executive Privilege: Protecting Presidential Confidentiality**

Article II is silent on two potentially important and related questions pertaining to the president’s roles as chief executive and commander in chief. The first, executive privilege, asks whether the president can refuse to supply the other branches of government with information about his activities. The second (covered in the next section) is immunity—whether and to what extent the president is protected from lawsuits while in office.
The executive privilege argument asserts that certain conversations, documents, and records are so closely tied to the sensitive duties of the president that they should remain confidential. Neither the legislature nor the judiciary should be allowed access to these materials without presidential consent, nor should the other branches be empowered to compel the president to hand over such items, especially those related to matters concerning national security or foreign policy. Executive privilege, it is argued, is inherent in the office of the president.

Although invoked infrequently, the privilege has been part of American history since the beginning of the nation. In some early disputes between the president and Congress, chief executives refused to provide certain information to the legislature. George Washington balked at giving the House of Representatives documents and correspondence pertaining to the Jay Treaty—a controversial treaty between the United States and Great Britain. In a message to the House, Washington wrote,

The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.\(^4^0\)


Washington was hardly alone. During the investigation and trial of Aaron Burr, Thomas Jefferson cooperated with congressional information requests, but only up to a point. He refused to produce some items and later declined to testify at the trial even though he was subpoenaed. Other presidents, too, through the years have refused to comply with congressional requests for testimony. It is generally accepted that Congress does not have the power to compel the president to come before it to answer questions. Whether other executive department officials are covered by claims of privilege is a more open question.

The George W. Bush administration claimed the privilege a handful of times against congressional investigations—mostly after Democrats took control of both houses of Congress in 2006 and launched a series of investigations.\(^4^1\) Bush’s successor, President Barack Obama, asserted executive privilege in response to demands from House Republicans on the Committee on Oversight and Government Reform for information on a sting operation against Mexican drug cartel activities that had gone awry. Interestingly, when Obama came into office, he had to decide how to deal with a claim of executive privilege by Bush, over the firing of U.S. attorneys in the face of a congressional subpoena. The Obama administration chose to negotiate an agreement whereby some of the requested documents and testimony would be provided, but only those documents from a specific period, and the testimony would not be in front of the public. Furthermore, the witnesses would not have to testify about communications to or from the president.

This is typical. In most instances, disputes over executive privilege are handled through negotiation between the executive branch and the institution requesting information. Only rarely have such disputes blown up into major court cases. When pushed to the limit, executive privilege claims may or may not prevail, but a president probably increases his chances of success when sensitive military or diplomatic matters requiring secrecy are involved.

No case involving executive privilege has been more important than United States v. Nixon (1974). It occurred at a time of great constitutional stress, when all three branches were locked in a fight about fundamental separation of powers issues.

The conflict ultimately was resolved when President Nixon resigned. Much of the impetus for breaking the constitutional deadlock came from the justices’ unanimous decision in the Nixon case. Chief Justice Warren Burger’s opinion for the Court reviewed the issues surrounding the executive privilege controversy and then rejected Nixon’s invocation of the doctrine.

**United States v. Nixon**


Vote: 8 (Blackmun, Brennan, Burger, Douglas, Marshall, Powell, Stewart, White)

0

OPINION OF THE COURT: Burger

NOT PARTICIPATING: Rehnquist

**FACTS:**

This case was one of many court actions spawned by the Watergate scandal, which began on June 17, 1972, when seven men broke into the Democratic National Committee headquarters located in the Watergate complex in Washington, D.C. The men were apprehended and charged with criminal offenses. All had ties either to the White House or to the Committee to Re-elect the President. Five of the seven pleaded guilty, and two were convicted. At the end of the trial, one of the defendants, James McCord Jr., claimed that he had been pressured to plead guilty and that other people involved in the break-in had not been prosecuted. Many suspected that the break-in was only the tip of a very large iceberg of shady dealings and cover-ups perpetrated by influential persons with close ties to the Nixon administration.

On May 17, 1973, the Senate began its investigation of the Watergate incident and the activities related to it. The star witness was John Dean III, special counsel to the president, who testified under a grant of immunity. Dean implicated high officials in the president’s office, and he claimed that Nixon had known about the events and the subsequent cover-ups. As surprising as Dean’s allegations were, the most shocking revelation came from Nixon adviser Alexander Butterfield, who testified that the president had installed a secret taping system that automatically recorded all conversations in the Oval Office. Obviously, the tape recordings held information that would settle the dispute between the witnesses claiming White House involvement in the Watergate affair and the administration officials who denied it.

In addition to the Senate investigation, a special prosecutor (today called a special counsel) was appointed to look into the Watergate affair. The first person to hold this position, Archibald Cox, asked the president to turn over the tapes. When Nixon declined, Cox went to court to get an order compelling him to deliver the materials. The district and appeals courts ruled in favor of Cox. Nixon then offered to release summaries of the recordings, but that did not satisfy Cox, who continued to pursue the tapes. In response, Nixon ordered that Cox be fired. When the two highest officials in the Justice Department resigned rather than comply with Nixon’s order, Solicitor General Robert Bork became the acting attorney general and dismissed Cox. The firing and resignations, popularly known as the “Saturday night massacre,” enraged the American people, and many began calling for the president’s impeachment.

Leon Jaworski was appointed to take Cox’s place. An attorney from Houston, Jaworski pursued the tapes with the same zeal as had Cox. Finally, Nixon relented and agreed to produce some of the materials. But when he did so the prosecutor found that the tapes had been heavily edited. One contained eighteen and one-half minutes of mysterious buzzing at a crucial point, indicating that conversation had been erased.

Jaworski obtained criminal indictments against several Nixon aides. Although no criminal charges were brought against the president, he was named in the indictment as a co-conspirator. At about the same time, the House Judiciary Committee began an investigation into whether the president should be impeached.

The Judiciary Committee and Jaworski sought more of the tapes to review, but Nixon steadfastly refused to comply, claiming that it was his right under executive privilege to decide what would be released and what would remain secret. The district court issued a final subpoena duces tecum, an order to produce the tapes and other documents. Both the United States and Nixon requested that the Supreme Court review the case, and the justices accepted the case on an expedited basis, bypassing the court of appeals.

**ARGUMENTS:**

For the petitioner, United States:

- Courts, not the president, have final authority to determine the applicability and scope of claims of executive privilege.
• The framers deliberately created a system in which the president is not above the law; therefore, the president is subject to judicial orders requiring compliance with his clearly defined legal duty as a citizen of the United States.

• Qualified executive privilege exists to protect only the legitimate functioning of the government. In this case, there is a compelling public interest in disclosure that outweighs any possible benefit that executive privilege may bring to the functioning of government.

For the respondent, Richard Nixon:

• Executive privilege is inherent in the executive power. The president has a duty to faithfully execute the laws, which cannot be done without executive privilege to preserve the integrity of deliberations in the executive office.

• The doctrine of separation of powers dictates that each branch should be free of coercive control by the other branches. It follows that the judicial branch cannot compel production of material from the executive branch when the president has a privilege that he can exercise at his own discretion.

• Presidential conversations are presumptively privileged, unless there is a showing that the materials are critical evidence with no effective substitute. The special prosecutor has not shown a compelling need for disclosure.

MR. CHIEF JUSTICE BURGER DELIVERED THE OPINION OF THE COURT.

[W]e turn to the claim that the subpoena should be quashed because it demands “confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce.” The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President’s claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena duces tecum.

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President’s counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all

This subpoena duces tecum was issued July 23, 1973. It ordered President Nixon or his representatives to appear before the federal grand jury on July 26 and to bring taped conversations relevant to the investigation of the Watergate affair.
Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison* (1803) that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” . . .

Notwithstanding the deference each branch must accord the others, the “judicial Power of the United States” vested in the federal courts by Art. III, §1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. We therefore reaffirm that it is the province and duty of this Court “to say what the law is” with respect to the claim of privilege presented in this case.

In support of his claim of absolute privilege, the President’s counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is
the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

The second ground asserted by the President’s counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President’s need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such communications, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. . . . To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of “a workable government” and gravely impair the role of the courts under Art. III.

Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the Judiciary from according high respect to the representations made on behalf of the President.

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution. . . .

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that “the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.” We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. . . .
In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. . . No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right “to be confronted with the witnesses against him” and “to have compulsory process for obtaining witnesses in his favor.” Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President’s responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President’s acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President’s broad interest in confidentiality of communications will not be vitiates by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

Accordingly, we affirm the order of the District Court that subpoenaed materials be transmitted to that court. We now turn to the important question of the District Court’s responsibilities in conducting the in camera (in private in the judge’s chambers) examination of Presidential materials or communications delivered under the compulsion of the subpoena duces tecum . . .

It is obvious that the District Court has a very heavy responsibility to see to it that Presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States . . . [The] President is [not] above the law, but . . . [his] President’s communications and activities encompass a vastly wider range of sensitive material than would be true of any “ordinary individual.” It is therefore necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice.

Since this matter came before the Court during the pendency of a criminal prosecution, and on representations that time is of the essence, the mandate shall issue forthwith.

Affirmed

The Court’s ruling was clear. In this case, the people’s interest in the fair administration of criminal justice outweighed the president’s interest in confidentiality. Executive privilege was rejected as a justification for refusing to make the tapes available to the special prosecutor. The opinion, however, does not answer questions about exactly who can invoke executive privilege or how long the privilege would be in effect, if at all. Based on the majority’s logic, do you think former presidents, high-ranking executive aides, or even the spouses of presidents could invoke executive privilege?
Nixon complied with the Court’s ruling, knowing full well that it meant the end of his presidency. In obeying the Court order, he avoided provoking what many feared would be the most serious of all constitutional confrontations. What if Nixon had refused to comply? What if he had destroyed the tapes rather than turn them over? Who could have enforced sanctions on the president for doing so? Impeachment and conviction of the president probably would have been the only way to handle such a crisis. Whatever Nixon’s culpability in Watergate and related matters, he spared the nation a crisis by bowing to the Supreme Court’s interpretation of the Constitution. The Nixon tapes revealed substantial wrongdoing. It was clear that the House of Representatives would present articles of impeachment and the Senate would vote to remove Nixon from office. Rather than put himself and the nation through such an ordeal, Nixon resigned.

Immunity: Protecting the President from Lawsuits

Presidential immunity is a variation on the notion of executive privilege. It deals with the extent to which the president is protected from lawsuits while in office, and the subject raises many interesting questions. May a president be ordered by a court to carry out certain executive actions, which are discretionary, or ministerial actions, which are performed as a matter of legal duty? Or conversely, may a president be restrained by a court from taking such actions? May a private party sue the president for damages that might have been suffered because of the president’s actions or omissions? If so, may a court order the president to pay damages or provide some other restitution? If a doctrine of immunity exists, should it extend only to actions taken by presidents while in office? These questions place us in a quandary. To grant the president immunity from such legal actions may remove needed accountability. But to allow the chief executive to be subject to suit could make the execution of presidential duties impossible.

The Supreme Court’s first significant venture into the area of executive immunity came in the aftermath of the Civil War. In *Mississippi v. Johnson* (1867), the Court was asked to enjoin the president from executing laws passed by Congress on the ground that the laws were unconstitutional. The justices unanimously concluded that the president was immune from such suits. Is this conclusion reasonable? Does the Court’s distinction between executive and ministerial acts make sense? To what degree do you think the Court was responding to the political conditions of the times? Following *Scott v. Sandford* (1857), holding that former or freed slaves were not American citizens (excerpted in Chapter 6), the Court’s prestige was at an all-time low, and congressional power was overwhelmingly dominant. Was the Court’s decision in *Mississippi v. Johnson* just a convenient way for the justices to avoid an unwinnable conflict with Congress?

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**Mississippi v. Johnson**

71 U.S. (4 WALL.) 475 (1867)


Vote: 9 (Chase, Clifford, Davis, Field, Grier, Miller, Nelson, Swayne, Wayne)

0

**OPINION OF THE COURT:** Chase

**FACTS:**

Following the Civil War, Congress passed a number of laws “for the more efficient government of the rebel
states.” Commonly known as the Reconstruction Acts of 1867, these laws imposed military rule over the Southern states until such time as loyal Republican governments could be established. Andrew Johnson, a Southerner from Tennessee, who had assumed the presidency after Lincoln’s assassination, vetoed the legislation, but the Radical Republicans in Congress had sufficient votes to override him. Once the acts were part of federal law, the president had little choice but to enforce them, despite his belief that they were unconstitutional.

The state of Mississippi joined the fray. Applying directly to the Supreme Court, Mississippi sued Johnson, asking the justices to issue an order prohibiting him from enforcing the laws, which the state argued were unconstitutional.

**ARGUMENTS:**

**For the petitioner, State of Mississippi:**

- The president is not and should not be above the law. The Constitution gives the federal courts judicial power over all cases arising under the Constitution and makes no distinction as to the parties.

- In Marbury v. Madison the Court held that the secretary of state was subject to legal process for actions taken on behalf of the president. If the subordinate is liable for the acts of his principal, it follows that the principal should also be subject to the same legal process.

- The president was performing a purely ministerial action because there was no exercise of discretion in carrying out an act of Congress. Although, as the Court held in Marbury, the courts cannot control the actions of officers in discretionary duties, the executive is not above the law with regard to ministerial duties.

**For the respondent, President Andrew Johnson:**

- This case is distinguishable from any case involving subordinate executive officers because subordinate officers are easily reappointed and disruption to those offices would not disrupt the entire government.

- The president is beyond the control of any other branch of the government, and, under the Constitution, can be tried only by Congress. Only if he has been impeached can he appear before the courts—and then as an individual, not as a representative of the people.

**THE CHIEF JUSTICE DELIVERED THE OPINION OF THE COURT.**

The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?

It is assumed by the counsel for the State of Mississippi, that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import.

A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.

The case of Marbury v. Madison, Secretary of State, furnishes an illustration. A citizen had been nominated, confirmed, and appointed a justice of the peace for the District of Columbia, and his commission had been made out, signed, and sealed. Nothing remained to be done except delivery, and the duty of delivery was imposed by law on the Secretary of State. It was held that the performance of this duty might be enforced by mandamus issuing from a court having jurisdiction . . .

In Marbury] nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by mandamus.

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other
duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as commander-in-chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as "an absurd and excessive extravagance."

It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.

It was admitted in the argument that the application now made to us is without a precedent; and this is of much weight against it. . . .

The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.

It will hardly be contended that Congress can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President?

The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

Suppose the bill filed and the injunction prayed for be allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?

These questions answer themselves.

It is true that a State may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us.

It has been suggested that the bill contains a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew Johnson, is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of a State.

The motion for leave to file the bill is, therefore, Denied.

The holding in this case is plain. The president of the United States cannot be sued to prevent the carrying out of “purely executive and political” functions. But the Supreme Court has allowed suits against the actions of lower-ranking executive officials. The very next year, the Court heard Georgia v. Stanton (1868), in which an injunction was sought to stop the secretary of war from enforcing the Reconstruction Acts. This suit also was unsuccessful, but it was decided on entirely different grounds—that it raised a political question. The Court found no bar to suing an executive branch administrator, even at the cabinet level.

The decision in Johnson settled the issue of whether the president may be sued as a person or as president with respect to executive functions, but it did not answer the question of civil suits brought by private individuals who claim harm by a president’s actions. If an incumbent president engages in activities that allegedly cause damages to private individuals, may the president be held accountable in a court of law? Or is the president immune from such suits? President Nixon found himself the object of such involving the dismissal of a federal employee. While reading the following decision,
consider the differences between the absolute immunity rule articulated by Justice Lewis F. Powell Jr. and the approach advocated in Justice Byron White’s dissenting opinion—that the scope of immunity is determined by function, not office.

**Facts:**

A. Ernest Fitzgerald was a civilian management analyst for the U.S. Air Force. In November 1968 Fitzgerald testified before a congressional committee chaired by Senator William Proxmire (D-Wis.). Fitzgerald reported that cost overruns for the C-5A transport plane might reach as high as $2 billion. In addition, he spoke about the technical problems the manufacturer had encountered in producing the aircraft. Needless to say, Fitzgerald’s testimony was not well received by the Department of Defense or military contractors.

Thirteen months later, in January 1970, Fitzgerald was removed from his job on the ground that a department reorganization had made a reduction in staff necessary. Fitzgerald believed he was fired in retaliation for his congressional appearance. The dismissal caused a great deal of concern among members of Congress, and Fitzgerald’s story was widely reported in the media.

The question was whether the Nixon administration was trying to get rid of a troublemaking whistleblower. At a press conference, the president said that he would look into the matter, and there appeared to be some attempt to find Fitzgerald another government position. That effort failed, perhaps because of an internal memorandum circulated by presidential aide Alexander Butterfield in which he concluded, “Fitzgerald is no doubt a topnotch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game. . . . [W]e should let him bleed, for a while at least.”

Denied another government job, Fitzgerald began legal action, first complaining to the Civil Service Commission and then filing a suit for damages. When asked about the Fitzgerald matter, President Nixon responded, “I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it. . . . No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it.”

The next day the president’s office retracted his statements, explaining that Nixon had confused Fitzgerald with someone else. But, as revealed in the Watergate tapes, Nixon boasted privately that he gave the order to “get rid of that son of a bitch.”

Fitzgerald’s lawsuit was against a number of federal executive branch officials, including Nixon, who had resigned during the early stages of the lower court proceedings. Nixon’s lawyers asserted that the former president should be removed from the suit on the ground of absolute executive immunity from legal actions based on his official conduct. The lower courts rejected the absolute immunity claim, and Nixon appealed.
ARGUMENTS:

For the petitioner, Richard Nixon:

- The framers intended to give the president absolute immunity from civil damage. The framers purposely chose to rely on checks and balances, public opinion, and the possibility of impeachment, instead of civil liability, to restrain the executive.
- The president’s visibility makes him a vulnerable target for lawsuits filed for political motives.
- The separation of powers system justifies absolute immunity. The president needs to be free from judicial oversight to keep executive deliberations confidential and preserve the integrity of the office. Anything less than absolute immunity would overly involve courts in executive decision making.

For the respondent, A. Ernest Fitzgerald:

- Supreme Court precedent regarding state governors and cabinet officers dictates that qualified immunity applies only where it is functionally required, depending on the circumstances of each case. Immunity is dependent on functions of an office, not on the title of the office.
- The checks and balances system counsels against absolute immunity. If the president were absolutely immune, Congress would lose a reliable source of information on the activities of the executive branch, and the courts would not be able to protect individuals whose rights have been trampled by the president.
- Even if absolute immunity is available to the president, he must first show that he was acting within the scope of his authority. The president has failed to justify that he has constitutional power to remove inferior officers who were appointed by the head of a department.

JUSTICE POWELL DELIVERED THE OPINION OF THE COURT.

This case now presents the claim that the President of the United States is shielded by absolute immunity from civil damages liability. . . . Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure. Historical inquiry thus merges almost at its inception with the kind of “public policy” analysis appropriately undertaken by a federal court. This inquiry involves policies and principles that may be considered implicit in the nature of the President’s office in a system structured to achieve effective government under a constitutionally mandated separation of powers . . .

Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history . . . .

The President occupies a unique position in the constitutional scheme. Article II, §1, of the Constitution provides that “[t]he executive Power shall be vested in a President of the United States . . . .” This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law—it is the President who is charged constitutionally to “take Care that the Laws be faithfully executed”; the conduct of foreign affairs—a realm in which the Court has recognized that “[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret”; and management of the Executive Branch—a task for which “imperative reasons require[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties.”

In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. We find these cases to be inapposite. The President’s unique status under the Constitution distinguishes him from other executive officials.

Because of the singular importance of the President’s duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. [A] President must concern himself with matters likely to “arouse the most intense feelings.” Yet . . . it is in precisely such cases that there exists the greatest public interest in providing an official “the maximum ability to deal fearlessly and impartially with” the duties of his office. This concern is compelling where the officeholder must make the most sensitive and
far-reaching decisions entrusted to any official under our constitutional system. Nor can the sheer prominence of the President’s office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.

Courts traditionally have recognized the President’s constitutional responsibilities and status as factors counseling judicial deference and restraint. For example, we have recognized that the Presidential privilege is “rooted in the separation of powers under the Constitution.” United States v. Nixon (1974). It is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States. But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, or to vindicate the public interest in an ongoing criminal prosecution—the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President’s official acts, we hold it is not.

In defining the scope of an official’s absolute privilege, the Court has recognized that the sphere of protected action must be related closely to the immunity’s justifying purposes. Frequently our decisions have held that an official’s absolute immunity should extend only to acts in performance of particular functions of his office. But the Court also has refused to draw functional lines finer than history and reason would support. In view of the special nature of the President’s constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the “outer perimeter” of his official responsibility.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of them highly sensitive. In many cases it would be difficult to determine which of the President’s innumerable “functions” encompassed a particular action. In this case, for example, respondent argues that he was dismissed in retaliation for his testimony to Congress. The Air Force, however, has claimed that the underlying reorganization was undertaken to promote efficiency. Assuming that petitioner Nixon ordered the reorganization in which respondent lost his job, an inquiry into the President’s motives could not be avoided under the kind of “functional” theory asserted both by respondent and the dissent. Inquiries of this kind could be highly intrusive. . . .

A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President’s traditional concern for his historical stature.

The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President “above the law.” For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

For the reasons stated in this opinion, the decision of the Court of Appeals is reversed, and the case is remanded for action consistent with this opinion.

So ordered.

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

The four dissenting Members of the Court in Butz v. Economou (1978) argued that all federal officials are entitled to absolute immunity from suit for any action they take in connection with their official duties. That immunity would extend even to actions taken with express knowledge that the conduct was clearly contrary to the controlling statute or clearly violative of the Constitution. Fortunately, the majority of the Court rejected that approach: We held that although public officials perform certain functions that entitle them to absolute immunity, the immunity attaches to particular functions—not to particular offices. Officials performing functions for which immunity is not absolute
The immunity is "rooted in the constitutional tradition for its holding of absolute immunity for the President, one of the other two branches of Government. Presidential function that will tolerate no interference by the President is mandated by the Constitution. [I]t is difficult to read the opinion coherently as standing for any narrower proposition: Attempts to subject the President to liability either by Congress through a statutory action or by the courts...would violate the separation of powers. Such a generalized absolute immunity cannot be sustained when examined in the traditional manner and in light of the traditional judicial sources. 

The functional approach to the separation-of-powers doctrine and the Court's more recent immunity decisions converge on the following principle: The scope of immunity is determined by function, not office. The wholesale claim that the President is entitled to absolute immunity in all of his actions stands on no firmer ground than did the claim that all Presidential communications are entitled to an absolute privilege, which was rejected in favor of a functional analysis, by a unanimous Court in United States v. Nixon (1974). Therefore, whatever may be true of the necessity of such a broad immunity in certain areas of executive responsibility, the only question that must be answered here is whether the dismissal of employees falls within a constitutionally assigned executive function, the performance of which would be substantially impaired by the possibility of a private action for damages. I believe it does not. 

I find it ironic, as well as tragic, that the Court would so casually discard its own role of assuring "the right of every individual to claim the protection of the laws," Marbury v. Madison, in the name of protecting the principle of separation of powers. Accordingly, I dissent.
In spite of the decisions in *Mississippi v. Johnson* and *Nixon v. Fitzgerald*, presidential immunity issues continue to appear—with *Clinton v. Jones* (1997) being the most recent example.

*Clinton* was surrounded by political intrigue and scandal. Paula Corbin Jones, a former state employee, had sued President Clinton for making “abhorrent” sexual advances in a Little Rock hotel room while he was governor of Arkansas. There were heated public arguments over whether this was a case of inexcusable sexual harassment or a groundless, politically motivated lawsuit designed to undermine and embarrass the president. Political rhetoric aside, the case presented a major constitutional issue: Can a sitting president be required to stand trial on allegations concerning his unofficial conduct? Jones’s supporters argued that the president is not immune from lawsuit and that Jones, like any other citizen, had the right to a prompt judicial determination of her claims of being unlawfully treated. Clinton’s supporters argued that the chief executive should not have to stand trial during his term of office. Allowing a trial to proceed would divert the president’s attention from his official duties; the situation would be made worse by a potential rash of civil lawsuits following the trial. The Supreme Court settled the issue on May 27, 1997.

**Clinton v. Jones**

520 U.S. 681 (1997)


Vote: 9 (Breyer, Ginsburg, Kennedy, O’Connor, Rehnquist, Scalia, Souter, Stevens, Thomas)

0

OPINION OF THE COURT: Stevens

CONCURRING OPINION: Breyer

**FACTS:**

Bill Clinton was elected to the presidency in 1992 and reelected in 1996. Before becoming president, Clinton served as governor of Arkansas from 1979 to 1981 and from 1983 to 1992. In 1994 Paula Jones filed suit in federal district court in Arkansas against Clinton and Arkansas state trooper Danny Ferguson over an incident that was alleged to have occurred on May 8, 1991, at the Excelsior Hotel in Little Rock. On the day in question, Jones, then an employee of the state Industrial Development Commission, was working at the registration desk for a management conference at which Governor Clinton had delivered a speech. According to her allegations, Ferguson approached Jones and indicated that the governor wanted to see her. Ferguson then escorted her to Clinton’s hotel suite, where Jones and the governor were left alone. The suit claimed that Clinton made “abhorrent” sexual advances to Jones, including exposing himself to her, touching her inappropriately, and making unwelcome sexual remarks. Jones said she rejected Clinton’s suggestions, and he ceased his advances. As she was leaving the room, Jones alleged, Clinton said to her: “You are smart. Let’s keep this between ourselves.”

Jones’s suit claimed that after she returned to her state job, her superiors began treating her rudely; she was ultimately transferred to another position that had little potential for advancement. She attributed this harsh treatment to retaliation for her rejection of the governor. The suit asked for actual damages of $75,000 and punitive damages of $100,000 in compensation for Clinton’s violations of state and federal civil rights and sexual harassment laws.

Clinton denied the allegations and claimed the lawsuit was politically motivated. He filed motions asking the district court to dismiss the case on the ground of presidential immunity and to prohibit Jones from refiling the suit until after the end of his presidency. The district judge rejected the presidential immunity argument. Although she allowed pretrial discovery activities to proceed, the judge ordered that no trial would take place until Clinton was no longer president. Both Jones and Clinton appealed. Holding that “the President, like all other government officials, is subject to the same laws that apply to all other members of society,” the court of appeals ruled that the trial should not be postponed. Clinton asked the Supreme Court to reverse the decision.

At the time, only three sitting presidents had been defendants in civil litigation involving their actions prior to taking office: Theodore Roosevelt, Harry Truman, and John F. Kennedy. All three suits had been dismissed or settled and so, as the Court noted, did not shed much “light on the constitutional issue” in this case.

**ARGUMENTS:**

For the petitioner, William Jefferson Clinton:

- The framers and the Supreme Court have recognized that the president is unlike any other public official in that he has the sole responsibility for an entire branch of the federal government.
Civil lawsuits would be distracting and disruptive not only to the president but also to the entire executive branch. To avoid offending the principle of separation of powers, judges should not be in the position of reviewing the president's priorities, which are inseparable from the priorities of the executive branch.

Allowing this lawsuit will invite future lawsuits, disrupting government affairs even more.

The Court should grant a temporary deferral of the case, which leaves the president still accountable for his conduct and does not place undue burdens on Jones.

For the respondent, Paula Corbin Jones:

- There is no precedent for granting presidential immunity as a purely personal privilege for lawsuits unrelated to official presidential duties. Instead,

Nixon v. Fitzgerald showed that presidents are not immune for acts outside official duties. This case does not involve executive branch communications or deliberations that need to be protected for the integrity of the branch.

- The separation of powers doctrine is concerned with the encroachment or aggrandizement of one branch at the expense of the other. The president has not shown that this lawsuit would have this effect.

- Deferral of the case would prolong the respondent's subjection to intense media scrutiny and would not hamper the effectiveness of the executive branch. The president has never been expected to personally execute every law, and presidents have always had time for personal commitments, including legal proceedings.

JUSTICE STEVENS DELIVERED THE OPINION OF THE COURT.

This case raises a constitutional and a prudential question concerning the Office of the President of the United States. Respondent, a private citizen, seeks to recover damages from the current occupant of that office based on actions allegedly taken before his term began. The President submits that in all but the most exceptional cases the Constitution requires federal courts to defer such litigation until his term ends and that, in any event, respect for the office warrants such a stay. Despite the force of the arguments supporting the President's submissions, we conclude that they must be rejected.

The principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct. In cases involving prosecutors, legislators, and judges we have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability.

That rationale provided the principal basis for our holding that a former President of the United States was "entitled to absolute immunity from damages liability predicated on his official acts," [Nixon v.] Fitzgerald [1982]. Our central concern was to avoid rendering the President "unduly cautious in the discharge of his official duties."

This reasoning provides no support for an immunity for unofficial conduct. As we explained in Fitzgerald, "the sphere of protected action must be related closely to the
immunity’s justifying purposes.” Because of the President’s broad responsibilities, we recognized in that case an immunity from damages claims arising out of official acts extending to the “outer perimeter of his authority.” But we have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity.

Moreover, when defining the scope of an immunity for acts clearly taken within an official capacity, we have applied a functional approach. “Frequently our decisions have held that an official’s absolute immunity should extend only to acts in performance of particular functions of his office.” Hence, for example, a judge’s absolute immunity does not extend to actions performed in a purely administrative capacity. As our opinions have made clear, immunities are grounded in “the nature of the function performed, not the identity of the actor who performed it.” . . .

Petitioner’s strongest argument supporting his immunity claim is based on the text and structure of the Constitution. He does not contend that the occupant of the Office of the President is “above the law,” in the sense that his conduct is entirely immune from judicial scrutiny. The President argues merely for a postponement of the judicial proceedings that will determine whether he violated any law. His argument is grounded in the character of the office that was created by Article II of the Constitution, and relies on separation of powers principles that have structured our constitutional arrangement since the founding.

As a starting premise, petitioner contends that he occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties. He submits that—given the nature of the function performed, the doctrine of separation of powers places limits on the authority of the Federal Judiciary to interfere with the Executive Branch that would be transgressed by allowing this action to proceed.

We have no dispute with the initial premise of the argument. Former presidents, from George Washington to George Bush, have consistently endorsed petitioner’s characterization of the office. . . . It does not follow, however, that separation of powers principles would be violated by allowing this action to proceed. The doctrine of separation of powers is concerned with the allocation of official power among the three coequal branches of our Government. . . .

Of course the lines between the powers of the three branches are not always neatly defined. But in this case there is no suggestion that the Federal Judiciary is being asked to perform any function that might in some way be described as “executive.” Respondent is merely asking the courts to exercise their core Article III jurisdiction to decide cases and controversies. Whatever the outcome of this case, there is no possibility that the decision will curtail the scope of the official powers of the Executive Branch. The litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power.

Rather than arguing that the decision of the case will produce either an aggrandizement of judicial power or a narrowing of executive power, petitioner contends that—as a byproduct of an otherwise traditional exercise of judicial power—burdens will be placed on the President that will hamper the performance of his official duties. . . . As a factual matter, petitioner contends that this particular case—as well as the potential additional litigation that an affirmance of the Court of Appeals judgment might spawn—may impose an unacceptable burden on the President’s time and energy, and thereby impair the effective performance of his office.

Petitioner’s predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case. [I]n the more than 200 year history of the Republic, only three sitting Presidents have been subjected to suits for their private actions. If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency. As for the case at hand, if properly managed by the District Court, it appears to us highly unlikely to occupy any substantial amount of petitioner’s time.

Of greater significance, petitioner errs by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive’s ability to perform its constitutionally mandated functions. . . . The fact that a federal court’s exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution. Two long-settled propositions, first announced by Chief Justice Marshall, support that conclusion.

First, we have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law. . . .
Second, it is also settled that the President is subject to judicial process in appropriate circumstances. Although Thomas Jefferson apparently thought otherwise, Chief Justice Marshall, when presiding in the treason trial of Aaron Burr, ruled that a subpoena duces tecum could be directed to the President. We unequivocally and emphatically endorsed Marshall's position when we held that President Nixon was obligated to comply with a subpoena commanding him to produce certain tape recordings of his conversations with his aides. United States v. Nixon (1974). As we explained, "neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."

Sitting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty. President Monroe responded to written interrogatories, President Nixon—as noted above—produced tapes in response to a subpoena duces tecum, President Ford complied with an order to give a deposition in a criminal trial, and President Clinton has twice given videotaped testimony in criminal proceedings. Moreover, sitting Presidents have also voluntarily complied with judicial requests for testimony.

In sum, "[i]t is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States." Fitzgerald. If the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct. The burden on the President's time and energy that is a mere by-product of such review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions. We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office.

We are persuaded that it was an abuse of discretion for the District Court to defer the trial until after the President leaves office. Such a lengthy and categorical stay takes no account whatever of the respondent's interest in bringing the case to trial. The complaint was filed within the statutory limitations period—albeit near the end of that period—and delaying trial would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party.

The decision to postpone the trial was, furthermore, premature. The proponent of a stay bears the burden of establishing its need. . . . We think the District Court may have given undue weight to the concern that a trial might generate unrelated civil actions that could conceivably hamper the President in conducting the duties of his office. If and when that should occur, the court's discretion would permit it to manage those actions in such fashion (including deferral of trial) that interference with the President's duties would not occur. But no such impairment upon the President's conduct of his office was shown here.

We add a final comment on two matters that are discussed at length in the briefs: the risk that our decision will generate a large volume of politically motivated harassing and frivolous litigation, and the danger that national security concerns might prevent the President from explaining a legitimate need for a continuance.

We are not persuaded that either of these risks is serious. Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant. Moreover, the availability of sanctions provides a significant deterrent to litigation directed at the President in his unofficial capacity for purposes of political gain or harassment. History indicates that the likelihood that a significant number of such cases will be filed is remote. Although scheduling problems may arise, there is no reason to assume that the District Courts will be either unable to accommodate the President's needs or unfaithful to the tradition—especially in matters involving national security—of giving "the utmost deference to Presidential responsibilities." Several Presidents, including petitioner, have given testimony without jeopardizing the Nation's security. In short, we have confidence in the ability of our federal judges to deal with both of these concerns.

If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation. . . . If the Constitution embodied the rule that the President advocates, Congress, of course, could not repeal it. But our holding today raises no barrier to a statutory response to these concerns.

The Federal District Court has jurisdiction to decide this case. Like every other citizen who properly invokes that jurisdiction, respondent has a right to an orderly disposition
of her claims. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

**JUSTICE BREYER, concurring in the judgment.**

I agree with the majority that the Constitution does not automatically grant the President an immunity from civil lawsuits based upon his private conduct. Nor does the “doctrine of separation of powers . . . require federal courts to stay” virtually “all private actions against the President until he leaves office.” Rather, as the Court of Appeals stated, the President cannot simply rest upon the claim that a private civil lawsuit for damages will “interfere with the constitutionally assigned duties of the Executive Branch . . . without detailing any specific responsibilities or explaining how or the degree to which they are affected by the suit.” To obtain a postponement the President must “bear[] the burden of establishing its need.”

In my view, however, once the President sets forth and explains a conflict between judicial proceeding and public duties, the matter changes. At that point, the Constitution permits a judge to schedule a trial in an ordinary civil damages action (where postponement normally is possible without overwhelming damage to a plaintiff) only within the constraints of a constitutional principle—a principle that forbids a federal judge in such a case to interfere with the President’s discharge of his public duties. I have no doubt that the Constitution contains such a principle applicable to civil suits, based upon Article II’s vesting of the entire “executive Power” in a single individual, implemented through the Constitution’s structural separation of powers, and revealed both by history and case precedent.

I recognize that this case does not require us now to apply the principle specifically, thereby delineating its contours; nor need we now decide whether lower courts are to apply it directly or categorically through the use of presumptions or rules of administration. Yet I fear that to disregard it now may appear to deny it. I also fear that the majority’s description of the relevant precedents de-emphasizes the extent to which they support a principle of the President’s independent authority to control his own time and energy. . . .

Case law, particularly, *Nixon v. Fitzgerald*, strongly supports the principle that judges hearing a private civil damages action against a sitting President may not issue orders that could significantly distract a President from his official duties. In *Fitzgerald*, the Court held that former President Nixon was absolutely immune from civil damage lawsuits based upon any conduct within the “outer perimeter” of his official responsibilities . . .

The majority relies upon the threat of sanctions to discourage, and “the court’s discretion” to manage, [civil damage lawsuits] so that “interference with the President’s duties would not occur.” I am less sanguine. Since 1960, when the last such suit [against Kennedy] was filed, the number of civil lawsuits filed annually in Federal District Courts has increased from under 60,000 to about 240,000; the number of federal district judges has increased from 233 to about 650; the time and expense associated with both discovery and trial have increased; an increasingly complex economy has led to increasingly complex sets of statutes, rules and regulations, that often create potential liability, with or without fault. And this Court has now made clear that such lawsuits may proceed against a sitting President. The consequence, as the Court warned in *Fitzgerald*, is that a sitting President, given “the visibility of his office,” could well become “an easily identifiable target for suits for civil damages.” [A]nd individual district court procedural rulings could pose a significant threat to the President’s official functions.

I concede the possibility that district courts, supervised by the Courts of Appeals and perhaps this Court, might prove able to manage private civil damage actions against sitting Presidents without significantly interfering with the discharge of Presidential duties—at least if they manage those actions with the constitutional problem in mind. Nonetheless, predicting the future is difficult, and I am skeptical. . . .

. . . The District Court in this case determined that the Constitution required the postponement of trial during the sitting President’s term. It may well be that the trial of this case cannot take place without significantly interfering with the President’s ability to carry out his official duties. Yet, I agree with the majority that there is no automatic temporary immunity and that the President should have to provide the District Court with a reasoned explanation why the immunity is needed; and I also agree that, in the absence of that explanation, the court’s postponement of the trial date was premature. For those reasons, I concur in the result.

The Court’s conclusion that Jones’s sexual harassment suit could proceed was a setback for President Clinton, who was by that time heavily involved in more
serious controversies that ultimately led to his impeachment (see Box 4-4). In the end, Clinton and Jones reached an out-of-court monetary settlement of the dispute. Although the Jones case never went to trial, the Supreme Court’s ruling that presidents while in office may be sued for unofficial conduct is a meaningful addition to the law of presidential immunity. It also remains controversial. Some scholars suggested that it would ultimately prove damaging to the presidency, while others argued that the Clinton episode was so anomalous that future plaintiffs

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**BOX 4-4**

Aftermath . . . Clinton v. Jones

IN Clinton v. Jones (1997), the Supreme Court rejected President Bill Clinton’s request to postpone a trial on Paula Jones’s sexual harassment charges until his presidency ended. Thus began two years of intense legal difficulties for the president. Clinton was already under investigation by independent counsel Kenneth Starr for possible financial improprieties in the Whitewater matter, an Arkansas land deal that occurred prior to his presidency. That investigation coupled with the Jones lawsuit subjected Clinton to more-intense scrutiny than almost any other previous president had experienced.

While preparing their case, Jones’s attorneys were made aware of a possible illicit relationship between Clinton and a young White House intern, Monica Lewinsky. Attempting to establish a pattern of wrongdoing, Jones’s lawyers subpoenaed Lewinsky and the president. Lewinsky at first denied any sexual relationship with Clinton. On January 17, 1998, President Clinton gave a sworn deposition claiming that he had not had a sexual relationship with Lewinsky. Nine days later he made the same denial to the American people on national television. Taped telephone conversations between Lewinsky and her friend Linda Tripp, who had given the tapes to the independent counsel’s office, revealed that a sexual relationship between Lewinsky and Clinton had occurred. Starr expanded his investigation to include an inquiry into the Lewinsky matter.

After receiving immunity from prosecution, Lewinsky changed her testimony, acknowledging a past relationship with Clinton. In August Clinton admitted to “a critical lapse of judgment” that had led to his affair with Lewinsky. By this time, other women had come forward claiming that Clinton had acted inappropriately with them. In November the president settled his legal dispute with Jones for $850,000 with no apology or admission of guilt.

Settling the case, however, did not end Clinton’s troubles. In December the House of Representatives considered four articles of impeachment recommended by its Judiciary Committee. Two of the proposals passed: one charged Clinton with perjury, and the other alleged obstruction of justice. As a result, Bill Clinton became only the second president in U.S. history to be impeached.

In January 1999, with Chief Justice William H. Rehnquist presiding and the senators acting as a jury, the U.S. Senate tried Clinton on the two articles of impeachment. On February 12 the senators voted 55–45 to acquit Clinton on the perjury charge and 50–50 on the obstruction of justice charge, both falling far short of the 67 guilty votes required to remove the president from office. Throughout the impeachment process, public opinion ran decidedly in Clinton’s favor.

Clinton’s legal problems continued. U.S. judge Susan Webber Wright, who presided over the Jones lawsuit, found Clinton in contempt and fined him $90,000 for undermining “the integrity of the judicial system” by giving “false, misleading, and evasive answers that were designed to obstruct justice.” In May 2000 the Arkansas Supreme Court initiated disbarment proceedings against him. But on January 19, 2001, his last full day in office, Clinton reached an agreement with the independent counsel in which he admitted wrongdoing and accepted a $25,000 fine and a five-year suspension of his license to practice law, thus settling the disbarment question.

Throughout all of these difficulties, Bill Clinton’s presidency was surprisingly unaffected. Polls indicated that the public perceived Clinton as a man with serious personal character flaws, but he nevertheless received historically high approval ratings for the job he was doing as president.

would be unlikely to take advantage of the Court’s ruling. The Trump presidency may supply more definitive answers about the importance of Clinton v. Jones, considering the number of civil suits now pending against Trump—including claims that he failed to pay hotel workers and that he defamed a former competitor on the television show The Apprentice who had accused Trump of sexual assault.

The Power to Pardon

Executive power historically has included the authority to reduce or rescind criminal punishments in individual cases. The executive stands as the last source of mercy, capable of sparing a person when extraordinary circumstances warrant such action. European monarchs exercised this power long before the creation of the United States, so it is not surprising that the Constitutional Convention also gave it to the president. The wording of the pardon clause is straightforward: the president “shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”

A pardon erases all penalties and other legal effects of a criminal conviction. It is, as described by Chief Justice John Marshall, an act of grace. A person receiving a complete pardon is released from serving any remaining sentence and has full civil rights restored. Legally, it is as if the individual had never committed the crime.42 A reprieve, in contrast, is a presidential act that merely postpones the serving of a criminal penalty.

The president’s power to grant pardons and reprieves is not absolute, however. The words of Article II restrict the president’s authority to crimes against the United States, which means that the president may pardon only individuals charged with federal offenses, not those in violation of state criminal laws. The governors of the various states have similar pardoning or clemency authority. Article II also prohibits the use of the pardoning power to nullify the effects of impeachment. Finally, the president may not impose a pardon on someone who refuses to accept it.43

Aside from these limits, the president is free to exercise the pardoning authority with full discretion, and some presidents have been quite generous in granting pardons. A pardon may completely void all criminal penalties for an offense or eliminate only a portion of the sentence. The president may place conditions on a pardon. In 1960 President Eisenhower spared army master sergeant Maurice Schick, a convicted murderer, from the death penalty on the condition that he be imprisoned for life without the possibility of parole.44 A president may pardon individuals before or after they are tried for offenses or even before formal criminal charges are filed. A pardon may be granted to a single person or to an entire class of individuals. In 1795 George Washington granted amnesty to those who had participated in the Whiskey Rebellion, and in 1977 Jimmy Carter pardoned all Vietnam War draft evaders, an action that applied to an estimated 100,000 men.

For the most part, the Supreme Court has granted the chief executive great leeway in the exercise of the pardon power. Ex parte Grossman (1925) provides an example. The issue in this case was whether the president’s pardon power extended to criminal contempt penalties imposed by a federal judge. Chief Justice Taft wrote the opinion of the Court. Taft, a former president, expressed strong support for a broad interpretation of the pardoning authority. In Grossman, note his use of history as a means of interpreting the Constitution.

Ex parte Grossman
267 U.S. 87 (1925)
Vote: 8 (Brandeis, Butler, Holmes, McReynolds, Sanford, Sutherland, Taft, Van Devanter)

OPINION OF THE COURT: Taft

FACTS:

On November 24, 2020, the federal government charged Philip Grossman with selling liquor at his place of business in violation of the National Prohibition Act. Government attorneys requested that the federal district judge issue an injunction prohibiting Grossman from any further violations, and two days later the judge did so. On January 11, 1921, the government filed charges against Grossman for violating the judge’s order,

[43]United States v. Wilson (1833) and Burdick v. United States (1915). Later, however, the Court held that acceptance was not required when the president commuted a death sentence to life in prison (Biddle v. Perovich, 1927).
claiming that he had continued to sell liquor at his establishment. The district court tried Grossman and found him guilty of criminal contempt of court for disobeying the order. The judge sentenced him to one year in prison and a fine of $1,000, and the sentence was upheld by the court of appeals.

In December 1923 President Calvin Coolidge issued a pardon in which he reduced Grossman's sentence to payment of the fine. Grossman accepted the pardon, paid the fine, and was released from prison. The district judge, however, refused to acknowledge the pardon on the ground that the president had no authority to commute a sentence for criminal contempt of court. He ordered Grossman to serve the remainder of his sentence. Grossman objected and filed a habeas corpus action against prison superintendent Ritchie Graham, demanding to be released.

ARGUMENTS:

For the petitioner, Philip Grossman:

- The Constitution should be read with the common meaning of each word at the time of its drafting. The common meaning of “offences” at the time included criminal contempt of court.
- Historically, the king of England exercised pardon power over contempt of court. There is no indication that the framers intended to change this power when they wrote the Constitution.
- There is no serious threat that the president would abuse the power to pardon a criminal contempt of court and impinge on the authority of the courts. Even if this were to happen, impeachment would be an appropriate remedy.

For the respondent, Ritchie V. Graham, Superintendent of the Chicago House of Correction, Cook County, Ill.:

- The president has the power to pardon only statutory offenses against the United States.
- The language of the Constitution shows that pardonable offenses include only those subject to trial by jury.
- Allowing the president to pardon criminal contempt of court would violate the doctrine of separation of powers by impinging on the independence and authority of the judiciary.

MR. CHIEF JUSTICE TAFT DELIVERED THE OPINION OF THE COURT.

The argument for the respondent is that the President's power extends only to offenses against the United States and a contempt of Court is not such an offense, that offenses against the United States are not common law offenses but can only be created by legislative act, that the President's pardoning power is more limited than that of the King of England at common law, which was a broad prerogative and included contempts against his courts chiefly because the judges thereof were his agents and acted in his name; that the context of the Constitution shows that the word “offences” is used in that instrument only to include crimes and misdemeanors triable by jury and not contempts of the dignity and authority of the federal courts, and that to construe the pardon clause to include contempts of court would be to violate the fundamental principle of the Constitution in the division of powers between the Legislative, Executive and Judicial branches, and to take from the federal courts their independence and the essential means of protecting their dignity and authority.

The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.

The King of England before our Revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court, just as he did ordinary crimes and misdemeanors and as he has done to the present day. In the mind of a common law lawyer of the eighteenth century the word pardon included within its scope the ending by the King’s grace of the punishment of such derelictions, whether it was imposed by the court without a jury or upon indictment, for both forms of trial for contempts were had.

Nor is there any substance in the contention that there is any substantial difference in this matter between
the executive power of pardon in our Government and the
King's prerogative. The courts of Great Britain were called
the King's Courts, as indeed they were; but for years before
our Constitution they were as independent of the King's
interference as they are today. The extent of the King's
pardon was clearly circumscribed by law and the British
Constitution, as the cases cited above show. The framers
of our Constitution had in mind no necessity for curtailing
this feature of the King's prerogative in transplanting it into
the American governmental structures, save by excepting
cases of impeachment; and even in that regard, as already
pointed out, the common law forbade the pleading a par-
don in bar to an impeachment. The suggestion that the
President's power of pardon should be regarded as nec-
necessarily less than that of the King was pressed upon this
Court . . . in Ex parte William Wells, [1855] but it did not pre-
vail with the majority. . . .

Nothing in the ordinary meaning of the words
"offences against the United States" excludes criminal
contempts. That which violates the dignity and authority
of federal courts such as an intentional effort to defeat
their decrees justifying punishment violates a law of the
United States, and so must be an offense against the
United States. Moreover, this Court has held that the gen-
eral statute of limitation which forbids prosecutions "for
any offense unless instituted within three years next after
such offense shall have been committed," applies to crim-
inal contempts. . . .

Moreover, criminal contempts of a federal court have
been pardoned for 85 years. In that time the power has
been exercised 27 times. . . .

Finally it is urged that criminal contempts should not
be held within the pardoning power because it will tend to
destroy the independence of the judiciary and violate the
primary constitutional principle of a separation of the leg-
islative, executive and judicial powers. . . .

Executive clemency exists to afford relief from undue
harshness or evident mistake in the operation or enforce-
ment of the criminal law. The administration of justice
by the courts is not necessarily always wise or certainly
considerate of circumstances which may properly miti-
gate guilt. To afford a remedy, it has always been thought
essential in popular governments, as well as in monarchies,
to vest in some other authority than the courts power to
ameliorate or avoid particular criminal judgments. It is
a check entrusted to the executive for special cases. To
exercise it to the extent of destroying the deterrent effect
of judicial punishment would be to pervert it; but whoever
is to make it useful must have full discretion to exercise
it. Our Constitution confers this discretion on the highest
officer in the nation in confidence that he will not abuse it.
An abuse in pardoning contempts would certainly emar-
rass courts, but it is questionable how much more it would
lessen their effectiveness than a wholesale pardon of other
offenses. If we could conjure up in our minds a President
willing to paralyze courts by pardoning all criminal con-
tempts, why not a President ordering a general jail delivery
[a forcible liberation of prisoners from jail]? . . .

If it be said that the President, by successive pardons
of constantly recurring contempts in particular litigation,
might deprive a court of power to enforce its orders in a
recalcitrant neighborhood, it is enough to observe that
such a course is so improbable as to furnish but little basis
for argument. Exceptional cases like this, if to be imagined
at all, would suggest a resort to impeachment rather than
to a narrow, and strained construction of the general pow-
ers of the President.

The power of a court to protect itself and its useful-
ness by punishing contemnors is of course necessary, but
it is one exercised without the restraining influence of a
jury and without many of the guaranties which the bill of
rights offers to protect the individual against unjust con-
viction. Is it unreasonable to provide for the possibility that
the personal element may sometimes enter into a summary
judgment pronounced by a judge who thinks his authority is
flouted or denied? May it not be fairly said that in order to
avoid possible mistake, undue prejudice or needless sever-
ity, the chance of pardon should exist at least as much in
favor of a person convicted by a judge as in favor of one convicted in a jury trial? The pardoning by the
President of criminal contempts has been practiced more
than three-quarters of a century, and no abuses during all
that time developed sufficiently to invoke a test in the fed-
eral courts of its validity.

It goes without saying that nowhere is there a more
earnest will to maintain the independence of federal courts
and the preservation of every legitimate safeguard of their
effectiveness afforded by the Constitution than in this
Court. But the qualified independence which they fortu-
nately enjoy is not likely to be permanently strengthened
by ignoring precedent and practice and minimizing the
importance of the coordinating checks and balances of the
Constitution.

The rule is made absolute and the petitioner is
discharged.
Undoubtedly, the most controversial exercise of the pardon power to date was Gerald Ford’s exoneration of Richard Nixon in 1974 (see Box 4-5). By resigning from office, Nixon kept all of the benefits the nation provides its former chief executives, but the resignation did not make him immune from a trial for Watergate-related crimes. The pardon covered any crimes Nixon may have committed during his entire tenure as chief executive, from January 20, 1969, through August 9, 1974. It was an extraordinary act: not only was Nixon the first president to be pardoned for possible wrongdoing, but he also received a blanket pardon covering almost six years and not restricted to any specific crimes or incidents. Furthermore, the pardon came before any formal criminal charges were brought against him. Ford’s stated intent in granting the pardon was to begin to heal the nation by putting the Watergate scandal to rest.

Many people were appalled at the pardon, believing that if Nixon had committed criminal acts, he should be put on trial like any other citizen. They thought it was necessary for the former president to stand trial because his alleged wrongdoing had compromised the very foundation of the American government and violated the sacred trust of the people. The granting of this blanket protection to Nixon was so widely criticized that some analysts cite it as one reason Ford lost the 1976 election to Jimmy Carter.

**BOX 4-5**

**Nixon Pardon Proclamation**

Following is the text of the proclamation by which President Gerald R. Ford, September 8, 1974, pardoned former president Richard Nixon:

Richard Nixon became the thirty-seventh President of the United States on January 20, 1969, and was re-elected in 1972 for a second term by the electors of forty-nine of the fifty states. His term in office continued until his resignation on August 9, 1974.

Pursuant to resolutions of the House of Representatives, its Committee on the Judiciary conducted an inquiry and investigation on the impeachment of the President extending over more than eight months. The hearings of the committee and its deliberations, which received wide national publicity over television, radio, and in printed media, resulted in votes adverse to Richard Nixon on recommended articles of impeachment.

As a result of certain acts or omissions occurring before his resignation from the office of President, Richard Nixon has become liable to possible indictment and trial for offenses against the United States. Whether or not he shall be so prosecuted depends on findings of the appropriate grand jury and on the discretion of the authorized prosecutor. Should an indictment ensue, the accused shall then be entitled to a fair trial by an impartial jury, as guaranteed to every individual by the Constitution.

It is believed that a trial of Richard Nixon, if it became necessary, could not fairly begin until a year or more has elapsed. In the meantime, the tranquility to which this nation has been restored by the events of recent weeks could be irreparably lost by the prospects of bringing to trial a former President of the United States. The prospects of such trial will cause prolonged and divisive debate over the propriety of exposing to further punishment and degradation a man who has already paid the unprecedented penalty of relinquishing the highest elective office in the United States.

Now, therefore, I, Gerald R. Ford, President of the United States, pursuant to the pardon power conferred upon me by Article II, Section 2, of the Constitution, have granted and by these presents do grant a full, free, and absolute pardon unto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969, through August 9, 1974.

In witness whereof, I have hereunto set my hand this 8th day of September in the year of Our Lord Nineteen Hundred Seventy-Four, and of the Independence of the United States of America the 199th.
Given the Supreme Court’s interpretations of the pardon power, there was little doubt that Ford acted constitutionally. Few legal scholars thought a court challenge had any chance of success. Prevailing legal opinion, however, did not deter a Michigan attorney from filing suit against Ford to have the pardon declared unconstitutional. The dispute was heard and decided in federal district court and did not reach the Supreme Court. As you read the judge’s opinion in Murphy v. Ford, notice how closely he ties his decision to the intention of the framers and to the precedents handed down by the Supreme Court.

**Murphy v. Ford**

390 F. Supp. 1372 (1975)

https://law.justia.com/cases/federal/district-courts/FSupp/390/1372/968699/

Decision of the U.S. District Court for the Western District of Michigan

Noel P. Fox, Chief Judge

**FACTS:**

F. Gregory Murphy, an attorney from Marquette, Michigan, filed suit against President Ford, asking the court to declare Ford’s unconditional pardon of Richard Nixon void. Murphy contended that a pardon cannot constitutionally be granted to a person who has not been indicted or convicted and who has not been formally charged with any crime against the United States. The suit was heard by Judge Noel Fox, a Democrat appointed to the district court by President Kennedy.

**CHIEF JUDGE FOX DELIVERED THE OPINION OF THE COURT.**

The main issue is, did President Ford have the constitutional power to pardon former President Nixon for the latter’s offenses against the United States?

In The Federalist No. 74, written in 1788 in support of the proposed Constitution, Alexander Hamilton explained why the Founding Fathers gave the President a discretionary power to pardon: “The principal argument for reposing the power of pardoning...[in] the Chief Magistrate,” Hamilton wrote, “is this: in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.”

Few would today deny that the period from the break-in at the Watergate in June 1972, until the resignation of President Nixon in August 1974, was a “season of insurrection or rebellion” by many actually in the Government. . . . Evidence now available suggests a strong probability that the Nixon Administration was conducting a covert assault on American liberty and an insurrection and rebellion against constitutional government itself, an insurrection and rebellion which might have succeeded but for timely intervention by a courageous free press, an enlightened Congress, and a diligent Judiciary dedicated to preserving the rule of law.

Certainly the summer and early fall of 1974 were a period of popular discontent, as the full extent of the Nixon Administration’s misdeeds became known, and public trust in government virtually collapsed. After Mr. Nixon’s resignation in August, the public clamor over the whole Watergate episode did not immediately subside; attention continued to focus on Mr. Nixon and his fate. When Mr. Ford became President, the executive branch was founder- ing in the wreckage of Watergate, and the country was in the grips of an apparently uncontrollable inflationary spiral and an energy crisis of unprecedented proportions.

Under these circumstances, President Ford concluded that the public interest required positive steps to end the divisions caused by Watergate and to shift the focus of attention from the immediate problem of Mr. Nixon to the hard social and economic problems which were of more lasting significance.

By pardoning Richard Nixon, who many believed was the leader of a conspiratorial insurrection and rebellion against American liberty and constitutional government, President Ford was taking steps, in the words of Alexander Hamilton in The Federalist, to “restore the tranquility of the commonwealth” by a “well-timed offer of pardon” [our italics] to the putative rebel leader. President Ford’s pardon of Richard M. Nixon was thus within the letter and the spirit of the Presidential Pardoning Power granted by the Constitution. It was a prudent public policy judgment.

The fact that Mr. Nixon had been neither indicted nor convicted of an offense against the United States does not affect the validity of the pardon. Mr. Justice Field, speaking for the [Supreme Court in Ex parte Garland (1867)], said that the Pardoning Power is “unlimited,” except in cases of impeachment. “[The Power] extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. . . . The benign prerogative of mercy reposed in [the President] cannot be fettered by any legislative restrictions. . . . A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon...
is full, it releases the punishment and blots out of existence the guilt. . . . If granted before conviction, it prevents any of the penalties and disabilities consequent from conviction from attaching, . . .

“There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.” . . . However, “. . . as the very essence of a pardon is forgiveness or remission of penalty, a pardon implies guilt; it does not obliterate the fact of the commission of the crime and the conviction thereof; it does not wash out the moral stain; as has been tersely said; it involves forgiveness and not forgetfulness.” Page v. Watson [Florida Supreme Court, 1938].

The . . . motion to dismiss this action is hereby granted.

The power to pardon continues to be an important executive prerogative. Often it is used to extend mercy where, because of special circumstances, strict application of the law would lead to unjust results. At times, however, its use is controversial because of political implications. In December 1992, shortly after he had been defeated for reelection, President George H. W. Bush granted pardons to six former executive branch officials, including former secretary of defense Caspar Weinberger. Those pardoned were facing criminal charges for alleged illegal dealings with Iran. President Clinton also faced his share of criticism for his “eleventh hour” pardon of 140 individuals, including his former housing secretary, Henry Cisneros, for a total of 396 pardons during his administration. In contrast, though commentators questioned President George W. Bush’s commutation of vice presidential adviser Lewis “Scooter” Libby’s prison sentence for perjury and other crimes associated with the leaking of classified information, Bush issued only 189 pardons during his administration (about the same as Obama’s 212).

In his first eighteen months in office, President Trump issued five, including one for contempt of court, which as you know from Grossman he is constitutionally permitted to do. Raising more questions is Trump’s tweet of June 4, 2018: “As has been stated by numerous legal scholars, I have the absolute right to PARDON myself, but why would I do that when I have done nothing wrong?” Trump is right to say that at least some scholars and lawyers agree that he can pardon himself. They note that the Constitution places no such limit on the president and that Supreme Court precedents give the president wide latitude in using his pardon power.45 But other commentators disagree. They point to a memo written by a Justice Department lawyer four days before Nixon resigned:

Pursuant to Article II, Section 2 of the Constitution, the “Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment,” is vested in the President. This raises the question whether the President can pardon himself. Under the fundamental rule that no one may be a judge in his own case, it would seem that the question should be answered in the negative [our italics].46

Where both sides converge is over the consequences of a self-pardon. As one of Trump’s lawyers noted, “Pardoning other people is one thing, pardoning yourself is tough.” It would “probably lead to immediate impeachment.”47

THE ROLE OF THE PRESIDENT IN EXTERNAL RELATIONS

In the areas implicating the nation’s external affairs—including foreign policy, militarized disputes, and war—the Constitution confers a good deal of authority on the president:

• Article II, Section 2, assigns to the president the role of commander in chief of the army and navy. This role pertains most directly to military capability but also to foreign policy: military power not only enables a nation to deter hostile actions from other countries, but it also can be used as a credible threat to persuade other nations to follow certain preferred courses of action. Armed interventions and full-scale wars can be major elements in executing a nation’s foreign policy.

47Rudy Giuliani on ABC and NBC news shows, June 3, 2018.
Modern military actions, both small and large, taken by the United States in Grenada, Panama, Afghanistan, Kuwait, Kosovo, Libya, and Iraq demonstrate the use of this power.

- Article II gives the president the sole authority to make treaties on behalf of the United States. These international agreements may cover almost any area of interaction among nations, including defense pacts, economic understandings, and human rights accords.

- The president selects the individuals to represent the United States in contacts with other nations. The power to appoint ambassadors and ministers influences U.S. relations with the leaders of other states.

- Article II, Section 3, provides that the president is the appropriate official to receive ambassadors and ministers from foreign nations. When the president accepts the credentials of foreign emissaries, the act confers U.S. recognition on the governments they represent. This provision also suggests that when foreign diplomats communicate with the United States they must do so through the president.

But the Constitution, in Article I, Section 8, also assigns substantial foreign policy and war powers to Congress, including the authority to:

- Provide for the common defense and general welfare of the country
- Declare war
- Raise and support armies
- Provide and maintain a navy
- Make rules to govern and regulate the land and naval forces
- Provide for calling up the militia to carry out the laws of the nation, suppress insurrections, and repel invasions
- Provide for organizing, arming, and disciplining the militia

Because the Constitution provides each branch with significant and potentially overlapping powers, external relations and, in particular, the power to wage war present an “invitation to struggle” between the president and Congress. For this reason, we consider external relations in some detail in Chapter 5, where we examine the distribution of power between and among the branches of government.

For now, it is worth noting that, on occasion, the Supreme Court has read the Constitution to give the president substantial authority for creating and implementing foreign policy. The broadest statement in this position comes in the case of *United States v. Curtiss-Wright Export Corp* (1936). We discussed this case in Chapter 3 as an example of the Court endorsing the notion of inherent powers enjoyed by the federal government in the field of foreign relations. Justice George Sutherland’s opinion for the Court also develops the president’s constitutional position in these matters. Throughout the opinion he emphasizes the president’s primacy: “In [the] external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.” Sutherland even contended that the president enjoys “plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but [only] must be exercised in subordination to the applicable provisions of the Constitution [our italics]”. Some of this language, as Sutherland noted in the opinion, comes from a speech that none other than John Marshall gave in the House of Representatives prior to his appointment as chief justice. Marshall said, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”

Why did Marshall and Sutherland characterize the president in this way? They both believed that more than Congress, the president has “the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.”

Have subsequent Courts agreed? Because we explore this question in some detail in Chapter 5, suffice it to say for now that the answer is both yes and no.

Let’s start with how the Court has undercut *Curtiss-Wright*. Chiefly, and in contrast to
Curtiss-Wright, the justices have often reminded us that the Constitution does not leave the president completely unfettered in the pursuit of the nation's foreign policy. In fact, the framers were sufficiently concerned about the distribution of these foreign policy prerogatives that, as we know, they gave the legislative branch various powers to counterbalance those of the executive. The president is commander in chief of the military, yes, but Congress has the power to raise and support the army and the navy, make rules for the military, call up the militia, and declare war. The president has the constitutional authority to make treaties, but a treaty cannot take effect unless the Senate ratifies it by a two-thirds vote. The president appoints ambassadors and other foreign policy ministers, but the Senate must confirm them.

For this reason, today’s justices often look to Congress when considering presidential action. Under an approach established in Youngstown Sheet & Tube Co. v. Sawyer (1952) (excerpted in Chapter 5), the president must show that a power is conclusively and exclusively his if he is taking action against Congress’s will. In Curtiss-Wright the president and Congress were on the same page; Congress had authorized the president to issue the embargo. In Youngstown they were not. When President Truman issued an executive order commanding his secretary of commerce to seize the nation’s steel mills to keep workers from striking, the Court thought he had adopted a method that Congress had declined to adopt to settle labor strikes. Because the justices found that Truman could not point to any specific statutory or constitutional authority for his executive order, they invalidated it.

This does not mean the Court will always strike down presidential actions of which Congress does not approve. In another case we consider in Chapter 5, Zivotofsky v. Kerry (2015), the Court upheld an executive action that Congress explicitly tried to overturn: the president did not want passports of U.S. citizens born in Jerusalem to list the country of birth as “Israel,” whereas Congress had passed a law allowing Israel to be recorded. In this case the Court ruled for the president because he was able to point to a conclusive and exclusive power in Article II—the power to “receive Ambassadors and other public Ministers.”

But even in Zivotofsky, the Court hardly ignored Congress’s role in foreign affairs, and even more to the point took the opportunity to push back on Curtiss-Wright. After quoting language from Curtiss-Wright on the president’s role as the sole organ of foreign affairs, the majority in Zivotofsky noted,

This description of the President’s exclusive power was not necessary to the holding of Curtiss-Wright—which, after all, dealt with congressionally authorized action, not a unilateral Presidential determination. Indeed, Curtiss-Wright did not hold that the President is free from Congress’ lawmaking power in the field of international relations. The President does have a unique role in communicating with foreign governments. . . . But whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law. . . .

. . . It is not for the President alone to determine the whole content of the Nation’s foreign policy.

Do you think Justice Sutherland would agree with this interpretation of his opinion?

Either way, and despite its repudiation of some of the language in Curtiss-Wright, we should keep in mind that the Court did rule for the president in Zivotofsky. Which brings us to the continuing vitality of Curtiss-Wright: as a general rule, the Court has been sympathetic to the executive branch when deciding disputes over the president’s foreign policy role. For example, the justices have been rather lenient in the handling of the president’s power to make treaties. In Goldwater v. Carter (1979), Senator Barry Goldwater (R-Ariz.) challenged President Carter’s authority to terminate a defense treaty with Taiwan without the consent of the Senate. The Court refused to confront the constitutional issues raised by Goldwater, dismissing the case without even scheduling oral arguments. With justices citing both political question and justiciability reasons, the Court found President Carter’s actions to be related to his foreign relations authority and therefore not reviewable by the Court.

The Court also has supported the growing tendency of presidents to enter into executive agreements with
other nations. Unlike treaties, these arrangements do not require Senate ratification (although many are made pursuant to legislation enabling the president to enter into certain agreements, including those involving trade or foreign aid or pursuant to the treaties themselves), so presidents often use them when they want to avoid the time-consuming and very public ratification process. But executive agreements have their limitations: federal law requires that the president inform Congress whenever such agreements are made, and they can be nullified by acts of Congress. Moreover, unlike treaties, executive agreements are not binding on future presidents without their consent.

As early as 1937, in *United States v. Belmont*, the Court not only endorsed the use of executive agreements but also blurred the distinction between such arrangements and fully ratified treaties. The Court held that the international agreements entered into by the president as part of the recognition of the Soviet Union had the force of law within the United States. The same set of agreements later was held to have sufficient force to supersede state law, just as treaties do. Because of the advantages of executive agreements and their approval by the Court, presidents have grown to favor such agreements over treaties. During its first century the United States entered into 275 treaties and 265 executive agreements, but from 1945 through 2008 the nation concluded 1,056 treaties and 16,735 executive agreements. President George W. Bush alone entered into 1,998 executive agreements but only 163 treaties. The Obama administration followed suit, with only 15 treaties and over 400 agreements.

Here we have provided you with but a taste of the relationship between Congress and the president in the sphere of external relations. We have much more to say about this subject, along with interactions between the branches in domestic affairs, in the next chapter.

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### ANNOTATED READINGS


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